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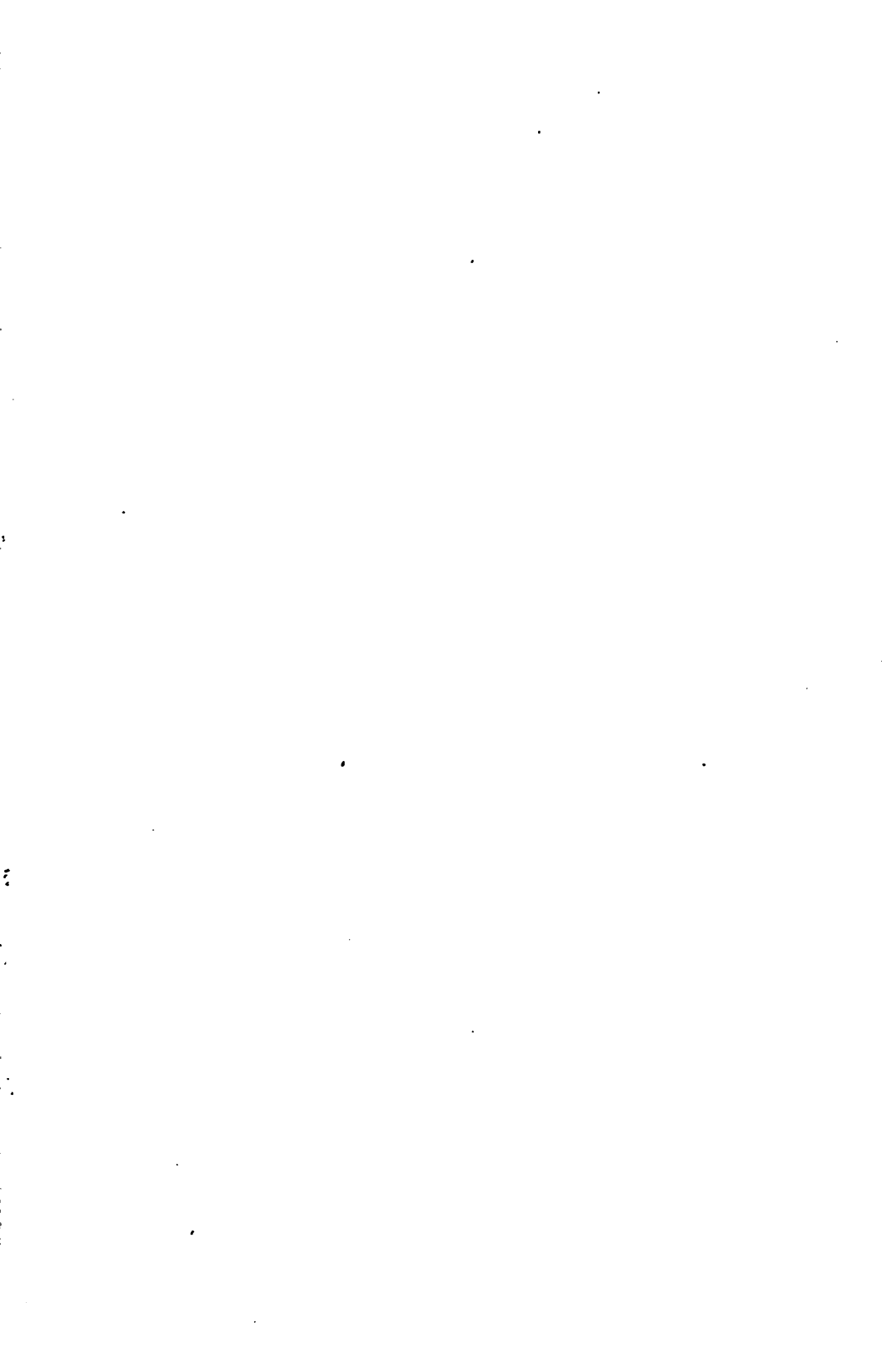


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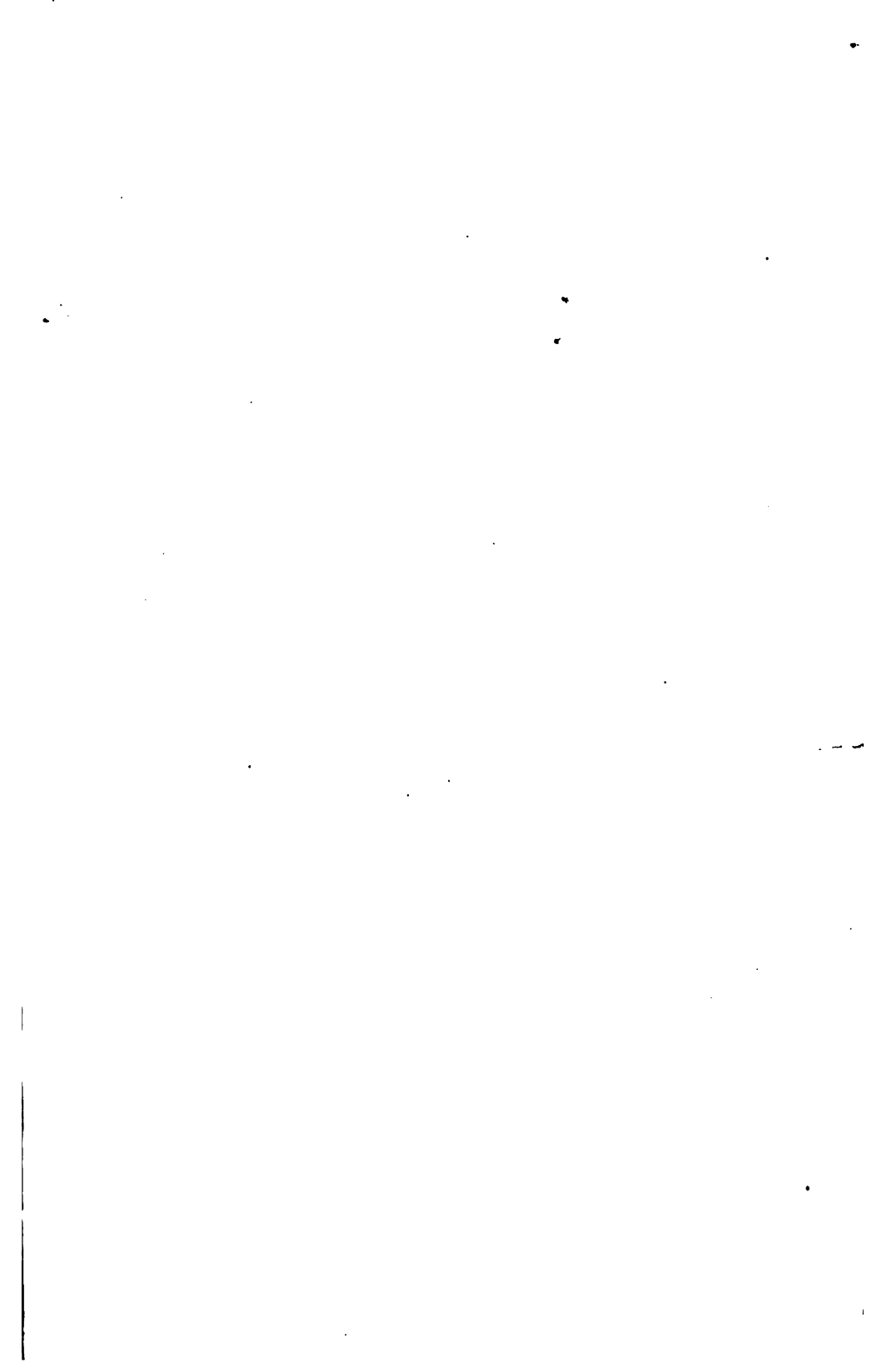


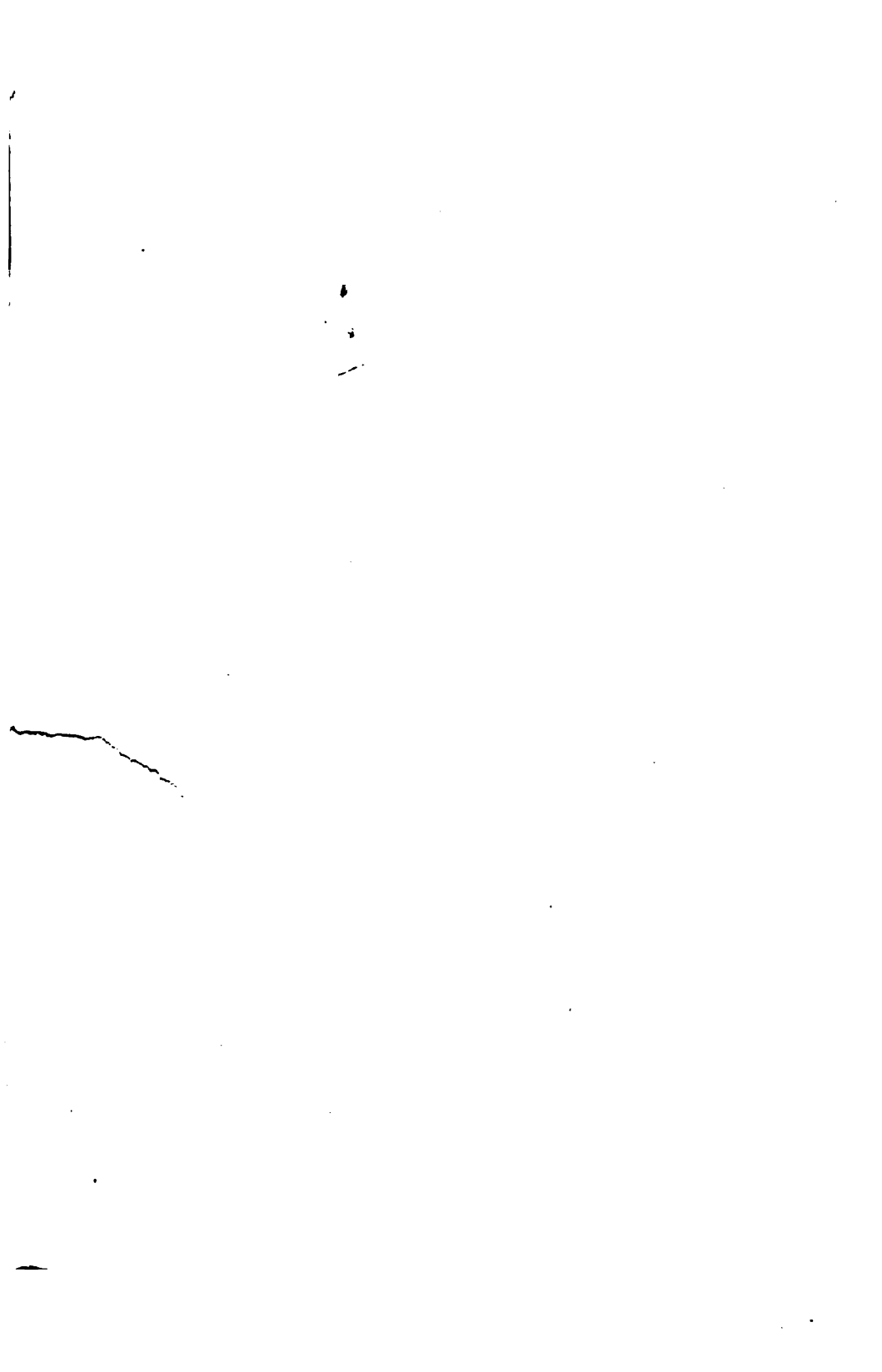












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REPORTS OF CASES

IN THE

# SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1886.

---

VOLUME XIX.

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BY

GUY A. BROWN,

OFFICIAL REPORTER.

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LINCOLN, NEB.:

STATE JOURNAL CO., LAW PUBLISHERS.

1886.

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In behalf of the people of Nebraska.

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*Rec. Oct. 15, 1886*

**THE SUPREME COURT**  
**OF**  
**NEBRASKA.**

1886.

---

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**SAMUEL MAXWELL,**

**JUDGES,**  
**M. B. REESE.**  
**AMASA COBB.**

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**ATTORNEY GENERAL,**  
**WILLIAM LEESE.**

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OF

## NEBRASKA.

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S. B. POUND,	SECOND DISTRICT.
M. L. HAYWARD,	SECOND DISTRICT.
JAMES NEVILLE,	THIRD DISTRICT.
E. WAKELEY,	THIRD DISTRICT.
A. M. POST,	FOURTH DISTRICT.
W. H. MORRIS,	FIFTH DISTRICT.
T. L. NORVAL,	SIXTH DISTRICT.
J. C. CRAWFORD,	SEVENTH DISTRICT.
WILLIAM GASLIN, JR.,	EIGHTH DISTRICT.
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F. G. HAMER,	TENTH DISTRICT.

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WILLIAM MARSHALL,	FOURTH DISTRICT.
MANFORD SAVAGE,	FIFTH DISTRICT.
THOMAS DARNALL,	SIXTH DISTRICT.
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F. M. HALLOWELL, . . .	TENTH DISTRICT.

## REPORTER'S NOTES.

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The volume of laws quoted as the "Revised Statutes," refers to the edition prepared in 1866 by E. Estabrook.

---

The volume of laws quoted as the "General Statutes," refers to the edition prepared in 1873 by Guy A. Brown.

---

The volume of laws quoted as the "Compiled Statutes," refers alike to the first edition, 1881, and second edition, 1885, compiled by Guy A. Brown.

---

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

---

This volume contains a report of decisions handed down prior to July Term, 1886, except those previously reported, and some cases in which rehearings have been granted.

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The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 23.

*Lincoln, October 1, 1886.*

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The following amendment to Rule 9 was adopted at the January term, 1886 :

[ABSTRACT.]—If the attorney for the defendant in error or appellee shall deem the abstract required by the foregoing rule to be imperfect or unfair, or so printed as not to contain matter sufficient to give the court a full understanding of the questions presented to it for decision, he may, within ten days after receiving the same, deliver to the attorney for the plaintiff in error or appellant one printed copy of such further and additional abstract as he shall deem necessary to a full understanding of the questions presented for decision, designating and pointing out the errors, inaccuracies, and deficiencies of the abstract of plaintiff in error or appellant, so that the same may be readily corrected and read as thereby amended, and shall likewise, on or before the hearing of said cause, deliver to the clerk six copies thereof.

# TABLE OF CASES REPORTED.

## A.

	PAGE
Adams County, Thatcher v.....	485
Ahlman v. Meyer & Schurman.....	63
REPLEVIN. NON-SUIT IMPROPER. INSTRUCTIONS.	
Allen v. VanOstrand.....	578
HERD LAW. NOTICE. DAMAGES. REPLEVIN.	
Aultman & Taylor Co. v. Jenkins.....	209
HOMESTEAD. MORTGAGE.	

## B.

Babcock, State, ex rel. Lincoln, v.....	223, 230
Ballard v. Cheney.....	58
PRACTICE IN SUPREME COURT. SPECIFIC PERFORMANCE.	
Ballard v. State.....	609
TRIAL. WITNESSES. CRIMINAL LAW. INSTRUCTIONS.	
Bennet, State, ex rel. Sage, v.....	191
Berthelsen, Hansen v.....	433
Bevins, Nelson v.....	715
Bissell v. Fletcher .....	725
PUBLIC LANDS OF THE UNITED STATES. ACCRETIONS.	
Bloom, State, ex rel. Cook, v.....	562
Boggs, Mattis v.....	698
Boldt v. Budwig.....	739
PARTIES. PETITION. SLANDER. NEW TRIAL.	
Bowen, Crow v.....	528
Bowers v. Rice.....	576
VERDICT. JUDGMENT.	
Bowman v. State.....	523
CRIMINAL LAW. NEW TRIAL. REMARKS BY COURT.	
Boyd v. The State.....	128
INJUNCTION. EFFECT OF ORDER. CONTEMPT.	

# 10      TABLE OF CASES REPORTED.

	PAGE
Bradshaw v. State.....	644
CRIMINAL LAW. NEW TRIAL.	
Brigham v. McDowell et al.....	407
ESTOPPEL. RES ADJUDICATA. ATTORNEY AND CLIENT.	
Broadwater v. Jacoby.....	77
APPEAL FROM JUSTICE OF THE PEACE. TRANSCRIPT. EVIDENCE.	
Browning, Hooper & Curtin v.....	420
Budwig, Boldt v.....	739
Bunz v. Cornelius.....	107
SPECIFIC PERFORMANCE. CONVEYANCE OF DEED.	
B. & M. R. R. Co. v. Crockett.....	138
RAILROAD. LIABILITY FOR INJURY TO EMPLOYEES.	
B. & M. R. R. Co. v. Dobson.....	451
JURISDICTION OF SUPREME COURT. IMPROVEMENTS.	
B. & M. R. R. Co., U. P. Ry. Co. v.....	386
B. & M. R. R. Co., Weir v.....	212
Burr, State, ex rel. Attorney General, v.....	593
Butler, VanSant v.....	351

## C.

Cain, Administrator, Saxon v.....	488
Caldwell v. Lincoln.....	569
MUNICIPAL CORPORATIONS. ILLEGAL TAXES.	
Carter, Munson v.....	293
Cheney, Ballard v.....	58
C. B. & Q. R. R. Co., Wright v.....	175
C., St. P., M. & O R. R., State, ex rel. Moore, v.....	476
Clay v. Tyson.....	530
STATUTE OF FRAUDS. ATTORNEY AND CLIENT.	
Cole v. Kerr.....	553
CHATTEL MORTGAGE. FUTURE PRODUCTS.	
Conner v. Hingtgen.....	472
STATUTE OF FRAUDS. CONTRACT.	
Cornelius, Bunz v.....	107
Crockett, B. & M. R. R. Co. v.....	138
Crow v. Bowen.....	528
COUNTY COURTS. JURISDICTION.	
Cruts v. Wray.....	581
NEW TRIAL. REPLEVIN. DAMAGES.	
Cummings v. Winters.....	719
FORCIBLE ENTRY AND DETENTION. VERDICT. EVIDENCE.	

# TABLE OF CASES REPORTED. 11

## D.

	PAGE
Dakota County, Davey v.....	721
Davey v. Dakota County.....	721

### PETITION. SPECIFIC PERFORMANCE.

Dennis v. Omaha National Bank.....	675
------------------------------------	-----

### REVIVOR OF JUDGMENT. COUNTY COURT. HOMESTEAD.

Derby, Vanderlip v.....	165
Dewey & Stone v. Payne & Co.....	540

### LANDLORD AND TENANT.

Dobson, B. & M. R. R. Co. v.....	451
Doll v. Hollenbeck .....	639

### MORTGAGE FORECLOSURE. USURY.

Doran & Holmes, Tiernan v.....	492
--------------------------------	-----

## E.

Evarts v. Smucker.....	41
------------------------	----

### PETITION ON MODIFIED CONTRACT. AMENDMENT.

## F.

Farmer, Gray, Burt & Kingman v.....	69
Farrington Bros., Frank & Sons v.....	44
Farrington Bros., Grimes & Co. v.....	44
Farrington Bros., Symms & Co. v.....	44
Farrington Bros., Tootle, Hanna & Co. v.....	44
Filley, Young v.....	543
Finch v. York County.....	50

### TAXES. MONEY LOANED BY NON-RESIDENT.

First National Bank, School District v.....	89
Fletcher, Bissell v.....	725
Flynn, Spielman v.....	342
Frank & Sons v. Farrington Bros.....	44

### FRAUD. ATTACHMENT. ASSIGNMENT. PREFERRING CREDITORS.

## G.

Gould v. Loughran.....	392
------------------------	-----

### JUDGMENT BEFORE JUSTICE OF PEACE. INJUNCTION.

Gray, Burt & Kingman v. Farmer.....	69
-------------------------------------	----

### INSTRUCTIONS. VERDICT.

Grimes & Co. v. Farrington Bros. ....	44
FRAUD. ATTACHMENT. ASSIGNMENT. PREFERRING CREDITORS	
Grosvenor, State, ex rex. Lindburg, v.....	494

# 12      TABLE OF CASES REPORTED.

## H.

	PAGE
Hall v. Strobe.....	658
ATTORNEY. ASSIGNMENT OF JUDGMENT TO.	
Hamilton v. Whitney, Clark & Co.....	303
JUDGMENT LIEN. APPEAL TO SUPREME COURT.	
Hammond, Woodward v.....	215
Hansen v. Berthelsen et al.....	433
CONVEYANCE BY UNDUE INFLUENCE. TRUSTS. FRAUDS.	
Hellman, et al. v. Spielman.....	152
AMERCEMENT. DAMAGES.	
Heye, Otoo county v.....	289
Hicks & Miller Tea Co. v. Mack, et al.....	339
HOMESTEAD. LIABILITY FOR DEBTS.	
Hingtgen, Conner v.....	472
Hinkley, Thomas v.....	324
Hitchcock et al., McKinster v.....	100
Hitchcock county, Morse v.....	566
Hitte admr. v. R. V. R. R. Co. ....	620
RAILROADS. NEGLIGENCE.	
Holden, State ex rel., Hostetter v.....	249
Hollenbeck, Doll v.....	639
Hooper and Curtin v. Browning.....	420
VERDICT. WITNESSES. EVIDENCE.	
Hopkins, McKeighan v.....	33
Hoyt v. Schuyler.....	652
CONVEYANCE. DEED. BONA FIDE PURCHASER.	
Hubbard v. Walker.....	94
REAL ESTATE. UNRECORDED DEED. LIEN OF JUDGMENT.	
Hutchinson v. State.....	262
TRIAL. CHALLENGE TO JURORS. BASTARDY. EVIDENCE.	
Hurds, State v.....	316

## I.

<i>In re</i> Reed.....	397
------------------------	-----

## J.

Jacoby v. Mitchell.....	537
BILL OF EXCEPTIONS. APPEAL. MOTION.	
Jacoby, Broadwater v.....	77
Jaynes, State, ex rel. Mechling, v.....	161, 697
Jenkins, Aultman & Taylor Co. v.....	209



## TABLE OF CASES REPORTED. 13.

	PAGE
Jones, Tootle, Hosea & Co. v.....	588
Jones & Magee Lumber Co., Marble v.....	732
Judges District Court, State, ex rel. Horse Ry. Co., v.....	149

### K.

Kerr, Cole v.....	553
Kinney et al., Yates v.....	275
Krum v. State.....	728

#### RAPE. EVIDENCE.

Kuhn, Parker v.....	394
---------------------	-----

### L.

Lamb v. Sherman .....	681
-----------------------	-----

#### JUDGMENT. JUDICIAL SALE. DEEDS.

Lamb, Wells v.....	355
Laverty, Ward v.....	429
Lawrence, State v.....	307
Leighton & Brown v. Stewart.....	546

#### HUSBAND AND WIFE. CHATTEL MORTGAGE. RES ADJUDICATA.

Lincoln, Caldwell v.....	569
Lincoln v. Woodward.....	259
MUNICIPAL CORPORATIONS. DEFECTIVE SIDEWALK. DAMAGES.	

Lipscomb v. Lyons .....	511
-------------------------	-----

#### HUSBAND AND WIFE. WITNESSES. EVIDENCE.

Lougran, Gould v.....	392
Lyons, Lipscomb v.....	511
Lyons, Murphy v.....	689

### M.

Mack, Hicks & Miller Tea Co. v.....	339
Majors, Skinner v.....	453
Marble v. Jones & Magee Lumber Co.....	732

#### MECHANIC'S LIEN.

Marsh, Masters v.....	458
Masters v. Marsh.....	458

#### BASTARDY. TRIAL. OFFER OF EVIDENCE.

Mathews v. State.....	330
-----------------------	-----

#### CRIMINAL LAW. RAPE. EVIDENCE.

Mattis v. Boggs .....	698
-----------------------	-----

#### EJECTMENT. PARTIES.

Maule, ex parte .....	273
-----------------------	-----

#### MISDEMEANOR. MITTIMUS. HABEAS CORPUS.

# 14      TABLE OF CASES REPORTED.

	PAGE
McDowell, Brigham v.....	407
McDowell, State ex rel. Wagner v.....	442
McGuire, Washburn v.....	98
McKeighan v. Hopkins..	33
PETITION. STATUTE OF LIMITATIONS. PRINCIPAL AND AGENT.	
McKinster v. Hitchcock et al.....	100
ACCOUNT STATED. ACTION ON. DEFENSE.	
McMurtry et al v. State.....	147
BILL OF EXCEPTIONS. DEFAULT. ANSWER.	
McPherson v. Wiswell et al. ....	117
CONTRACT. RESCISSION. TRIAL. INSTRUCTIONS.	
Meeker, State ex rel. Dodson, v.....	444
Meeker, State ex rel. Griggs, v.....	106
Merrick County, Suydham v.....	155
Meyer v. Wilkie.....	509
TRIAL. VERDICT.	
Meyer & Schurman, Ahlman v.....	63
Mitchell, Jacoby v.....	537
Morrill v Tegarden.....	534
MALPRACTICE. EVIDENCE. EXPERTS. TRIAL.	
Morse v. Hitchcock County.....	566
COUNTIES. TAXES. NEW COUNTIES. RECORDS.	
Munson v. Carter.....	293
CONTRACT. COERCION IN MAKING.	
Murphy v. Lyons.....	689
SUMMONS. JURISDICTION. EVIDENCE.	

## N.

Nelson v. Bevins.....	715
RES ADJUDICATA. HUSBAND AND WIFE.	

## O.

O'Brien v. O'Brien.....	584
DIVORCE. MODIFYING DECREE. ALIMONY.	
Omaha National Bank, Dennis v.....	675
Otoe County v. Heye et al.....	289
ROADS. DAMAGES ON OPENING. INSTRUCTIONS.	

## P.

Parker v. Kuhn et al.....	394
BILL OF EXCEPTIONS.	
Payne & Co., Dewey & Stone v.....	540

# TABLE OF CASES REPORTED. 15

	PAGE
Perry, Riddle v.....	505
Platt, Schribar v.....	625
Post v. School District 10, Gage County.....	135
EVIDENCE. LOST PAPERS. SCHOOL DISTRICT BONDS.	

## R.

Reed v. Estate of Thompson.....	397
JUDGMENT. OPENING UNDER SECTION 82, CODE.	
Ried v. State.....	695
WITNESS FEES.	
R. V. R. R. Co., Hitte, Admr. v.....	620
Rice, Bowers v.....	576
Riddle v. Perry.....	505
WAGER. CRIMINAL LAW.	
Roggencamp v. Seeley.....	170
TRIAL WITHOUT A JURY.	
Roberts v. Taylor.....	184
LIQUORS. ACTION AGAINST SALOON KEEPER.	

## S.

Saline County, State, ex rel. Globe Publishing Co., v.....	253
Saxon v. Cain, Administrator.....	488
CONFIRMATION OF SALE. WAIVER BY ADMINISTRATOR.	
Schribar v. Platt.....	625
JUDGMENT LIEN. CLOUD ON TITLE.	
School District v. First National Bank of Xenia.....	89
SCHOOL DISTRICT BONDS. STATUTE OF LIMITATIONS.	
School District 10, Gage Co., Post v.....	135
Schuyler, Hoyt v.....	652
Seeley, Roggencamp v.....	170
Sheldon, Traphagen v.....	75
Shelly, Towle v.....	632
Sherman, Lamb v.....	681
Shuman v. Willets.....	705
PRACTICE IN SUPREME COURT.	
Sioux City and Pacific R. R. Co., Turner v.....	241
Skinner v. Majors.....	453
CONTRACT. BREACH.	
Skirving, State ex rel. Malloy v.....	497
Smith v. Smith.....	706
HUSBAND AND WIFE. DIVORCE IN FOREIGN STATE.	

	PAGE
Smucker, Everts v.....	41
Spellman, York v.....	357
Spielman v. Flynn.....	342
JUSTICE OF THE PEACE. STENOGRAPHER'S RECORD. CONTINU- ANCE.	
Spielman, Hellman et al. v.....	152
State v. Hurds.....	316
SALE OF MORTGAGED CHATTELS. CONSTITUTIONAL LAW.	
State v. Lawrence.....	307
INCEST. INDICTMENT. EVIDENCE.	
State, Ballard v.....	609
State, Bowman v.....	523
State, Boyd v.....	128
State, Bradshaw v.....	644
State, Hutchinson v.....	262
State, Krum v.....	728
State, Mathews v.....	330
State, McMurtry v.....	147
State, Reid v.....	695
State, Stevens v.....	647
State, ex rel. Attorney General, v. Burr.....	593
ATTORNEY. UNLAWFUL CONDUCT. HABEAS CORPUS. REMOVAL FROM OFFICE.	
State, ex rel. Cook, v. Bloom.....	562
SCHOOL DISTRICT MONEY.	
State, ex rel. Dodson, v. Meeker.....	444
REMOVAL OF COUNTY OFFICERS. FILLING VACANCY.	
State, ex rel. Globe Publishing Co., v. Saline County.....	253
COUNTY. STATIONERY SUPPLIES.	
State, ex rel. Griggs, v. Meeker.....	106
PUBLIC RECORDS. FEE BOOK. EXAMINATION.	
State, ex rel. Horse Ry. Co., v. The Judges of the District Court...	149
MANDAMUS. SUPERSEDEAS BOND.	
State, ex rel. Hostetter, v. Holden.....	249
CITIES OF SECOND CLASS AND VILLAGES.	
State, ex rel. Lincoln, v. Babcock.....	223
MUNICIPAL CORPORATION. BONDS. CERTIFICATION.	
State, ex rel. Lincoln, v. Babcock.....	230
MUNICIPAL CORPORATIONS. AID TO INTERNAL IMPROVEMENTS. STATUTORY AUTHORITY. BONDS.	
State, ex rel. Lindburg, v. Grosvenor.....	494
TEACHER'S CERTIFICATE. REFUSAL TO PAY TEACHER'S WAGES.	

# TABLE OF CASES REPORTED. 17

	PAGE
State, ex rel. Lucas, v. Thiele.....	220
MANDAMUS. SUPERSEDAS BOND. CONDITIONS.	
State, ex rel. Malloy, v. Skirving.....	497
COUNTY COMMISSIONER. VACANCY.	
State, ex rel. Mechling, v. Jaynes.....	161
MANDAMUS. JUSTICE OF THE PEACE. PLEADING.	
State, ex rel. Mechling, v. Jaynes.....	697
COSTS IN MANDAMUS CASES.	
State, ex rel. Moore, v. C., St. P., M. & O. R. R.....	476
MANDAMUS. POWER OF RAILROAD COMMISSION.	
State, ex rel. Sage, v. Bennett.....	191
MUNICIPAL CORPORATION. TAX ON BUSINESS.	
State, ex rel. Wagner, v. McDowell.....	442
MUNICIPAL CORPORATIONS. SALARY OF OFFICERS.	
Stefani, Stough v.....	468
Stevens v. State.....	647
CRIMINAL LAW. INFORMATION. ROBBERY.	
Stone, White Lake Lumber Co. v.....	402
Stough v. Stefani.....	468
CONVERSION. ERROR. INSTRUCTIONS.	
Strode, Hall v.....	658
Stuart, Leighton & Brown v.....	546
Suydam v. Merrick County.....	155
TAXES. BOARD OF EQUALIZATION. INCREASE OF VALUATION.	
Symms & Co. v. Farrington Bros.....	44
FRAUD. ATTACHMENT. ASSIGNMENT. PREFERRING CREDITORS.	

## T.

Taylor, Roberts v.....	184
Tegarden, Morrill v.....	534
Thatcher v. Adams County.....	485
SCHOOL DISTRICTS. TAXES. MANDAMUS.	
Thiele, State, ex rel. Lucas, v.....	220
Thomas v. Thomas.....	81
PRACTICE IN SUPREME COURT. DECREE OF DIVORCE.	
Thomas et al. v. Hinkley.....	324
LIQUORS. BOND OF SELLER. APPROVAL.	
Thompson, Estate of, Reed v.....	397
Tiernan v. Doran & Holmes.....	492
PARTNERSHIP. ACTION FOR SERVICES.	

## 18      TABLE OF CASES REPORTED.

	PAGE
Tootle, Hanna & Co. v. Farrington Bros.....	44
FRAUD. ATTACHMENT. ASSIGNMENT. PREFERRING CREDITORS.	
Tootle, Hosea & Co. v. Jones.....	588
JUSTICE OF PEACE. APPEARANCE. WAIVER.	
Towle v. Shelly.....	632
TAXES. SALE. FORECLOSURE OF LIEN.	
Traphagen v. Sheldon.....	75
FINAL JUDGMENT.	
Turner v. Sioux City & Pacific R. R. Co.....	241
EXEMPTION. GARNISHMENT.	
Tyson, Clay v.....	530

### U.

U. P. Ry. Co. v. B. & M. R. R. Co.....	386
MUNICIPAL CORPORATIONS. ASSESSORS OF DAMAGES.	

### V.

Vanderlip v. Derby .....	165
LIQUORS. CONSTRUCTION OF STATUTE. LICENSE.	
VanSant v. Butler.....	351
PUBLIC LANDS OF THE UNITED STATES. EVIDENCE.	
VanOstrand, Allen v.....	578

### W.

Walker, Hubbart v.....	94
Ward v. Lavery.....	429
INFANT. MARRIAGE DURING NONAGE. DISAFFIRMANCE OF DEED.	
Washburn v. McGuire.....	98
ATTACHMENT. AFFIDAVIT.	
Webster v. Wray.....	558
PRINCIPAL AND AGENT. NEGOTIABLE INSTRUMENTS.	
Weir v. B. & M. R. R. Co.....	212
TRIAL. OBJECTIONS TO INSTRUCTIONS.	
Wells v. Lamb.....	355
ASSIGNMENT FOR CREDITORS.	
White Lake Lumber Co. v. Stone.....	402
APPEAL. FINDING. PRINCIPAL AND AGENT.	
Whitney, Clark & Co., Hamilton v.....	303

# TABLE OF CASES REPORTED. 19

	PAGE
Wilkie, Meyer v.....	509
Willels, Shuman v.....	705
Winters, Cummings v.....	719
Wiswell, McPherson v. ....	117
Woodward, Lincoln v.....	259
Woodworth v. Hammond.....	215

## CONTRACT TO DIG WELL. CONDITIONS. VERDICT.

Wray, Cruts v.....	581
Wray, Webster v.....	558
Wright v. C. B. & Q. R. R. Co.....	175

## EXEMPTION. GARNISHMENT. WAGES.

## Y.

Yates v. Kinney et al.....	275
----------------------------	-----

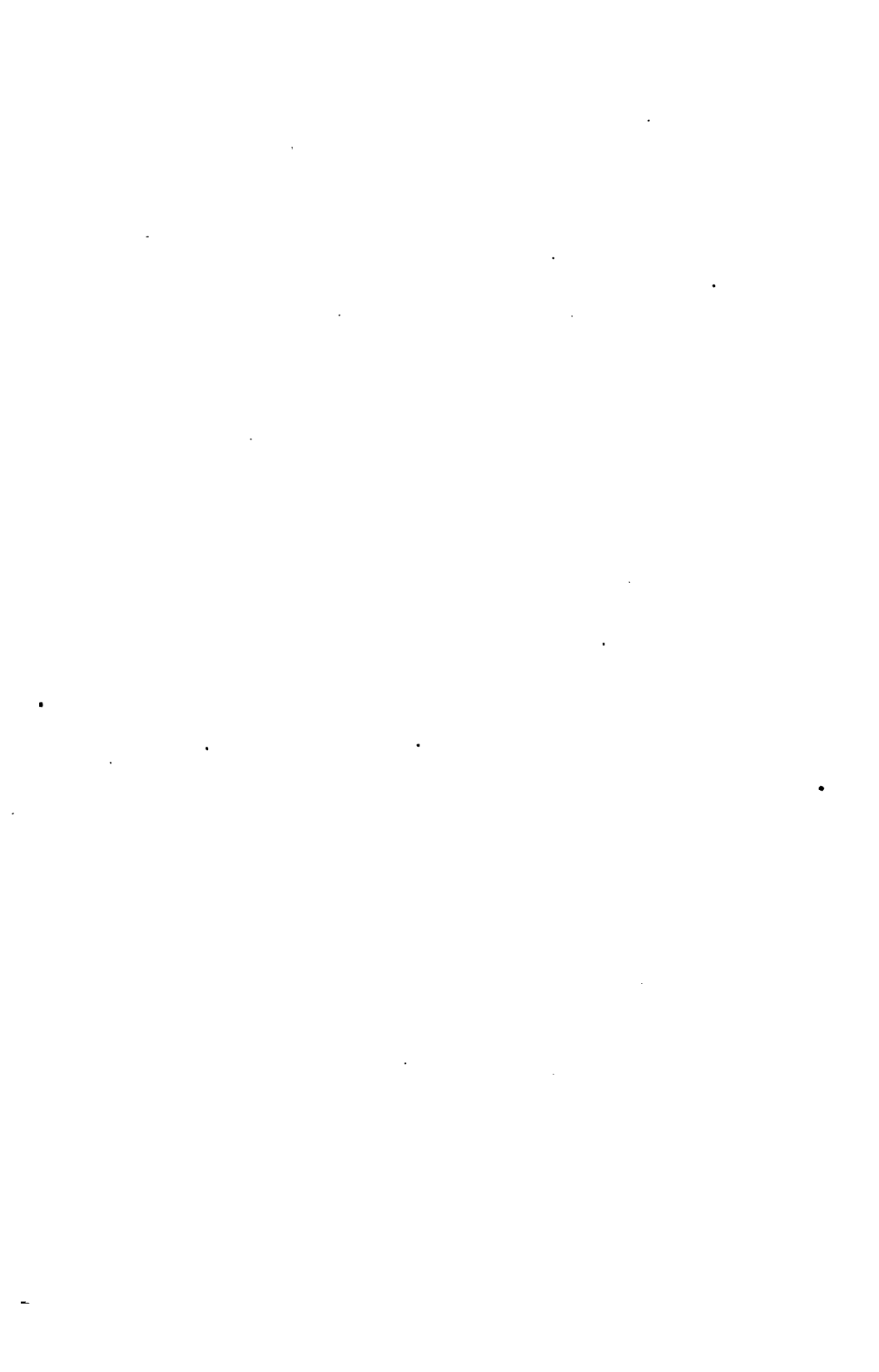
## LANDLORD AND TENANT. MORTGAGE OF CROP BY TENANT.

York v. Spellman .....	357
------------------------	-----

## INJURIES ON ACCOUNT OF DEFECTIVE SIDEWALKS.

York County, Finch v.....	50
Young v. Filley.....	543

## SALE. WARRANTY. DAMAGES.





# TABLE OF CASES CITED.

## A.

	PAGE
Albany v. Meekin, 3 Ind., 481.....	56
Albany v. Parnell, 11 N. C., 51 .....	54
Allen v. Gibson, 4 Rand., 468 .....	703
Allen v. Hartfield, 76 Ill., 358 .....	127
Ames v. Sloat, Wright, 577.....	578
Anderton v. Shoup, 17 O. S., 125 .....	561
Antekel v. Converse, 17 O. S., 11 .....	439
Appeal Tax Ct. v. Patterson, 50 Md., 368.....	52
Ashton v. Thompson, 18 N. W. R., 918.....	436
Aspinwall v. Aspinwall, 18 Neb., 463.....	586
Atkins v. Atkins, 9 Neb., 191.....	692
Aultman v. Howe, 10 Neb., 10 .....	148
Aultman v. Obermeyer, 6 Neb., 260.....	517

## B.

Babcock v. Eckler, 24 N. Y., 623 .....	40
Bailey v. State, 4 O. S., 440 .....	309
Ballard v. Johnson, 65 N. C., 436 .....	36
Bank of America v. Hooper, 5 Gray, 567.....	561
Bank of St. Clairsville v. Smith, 5 Ohio, 222 .....	439
Bankhead v. Alloway, 6 Coldw. (Tenn.), 56 .....	104
Banks v. Uhl, 5 Neb., 240 .....	592
Barlow v. Congregational Society, 8 Allen, 460.....	560
Barney v. McCarty, 15 Ia., 510 .....	306
Barrett v. French, 1 Conn., 364 .....	703
Bass v. O'Brien, 12 Gray, 477.....	561
Batterman v. Finn, 32 Howard's Pr., 501.....	134
Battle v. Mobile, 9 Ala., 234.....	57
Baumer v. The State, 49 Ind., 544... ..	316
Bedford Com. Ins. Co. v. Covell, 8 Metc., 442.....	561
Berlin v. Gorham, 34 N. H., 256 .....	251
Berryhill v. Kirchner, 96 Penn. St., 489.....	438
Bierbower v. Polk, 17 Neb., 268.....	48
Biglow v. W. W. R. R. Co., 27 Wis., 478.....	292
Bills v. Mason, 42 Ia., 329.....	246

	PAGE
Birdsall v. Carter, 5 Neb., 517.....	694
Black v. Winterstein, 6 Neb., 224.....	578
Blair v. West Point Manufacturing Co., 7 Neb., 146 ..	692
Board of Supervisors v. Decker, 34 Wis., 380 .....	34
Boker v. Chapline, 12 Iowa, 204.....	691
Boyer v. Barr, 8 Neb., 68.....	745
Breckenridge Heirs v. Ormsby, 1 J. J. Marsh., 236.....	441
Brewer v. Linnaeus, 36 Me., 428.....	711
Brittin v. Handy, 20 Ark., 381.....	637
Brown v. Combs, 5 Dutch, 36-42.....	39
Brown v. Parker, 7 Allen, 337 .....	561
Brown v. Payson, 6 N. H., 443 .....	415
Buchan v. Sumner, 2 Barb. Ch., 165.....	306
Burlington v. Putman Ins. Co., 31 Ia., 102 .....	206
B. & M. R. R. Co. v. Saunders Co., 9 Neb., 507.....	93
Burnside v. Terry, 51 Ga., 186 .....	415
Bush v. Bradley, 4 Day, 298 .....	704
Butler v. Porter, 13 Mich., 292 .....	636

## C.

Cabon v. Gruenig, 18 Neb., 562 .....	687
Calef v. Calef, 54 Me., 365.....	313
Call v. Gray, 37 N. H., 428.....	552
Carmichael v. Argard, 52 Wis., 609.....	34
Carpenter v. Longan, 16 Wall., 271.....	643
Catlin v. Hull, 21 Vt., 152.....	56
Catron v. Shepherd, 8 Neb., 308.....	44
Casey v. Davis, 100 Mass., 124.....	181, 182
Cecil v. Cecil, 19 Md., 72.....	630
City of Crete v. Childs, 11 Neb., 257.....	619
Chatham v. Niles, 36 Conn., 403 .....	104
Cheney v. Eberhardt, 8 Neb., 423.....	175
C. & A. R. R. Co. v. Ragland, 84 Ill., 375.....	181
C., St. P., M. & O. R. R. Co. v. Lundstrom, 16 Neb., 254 .....	146
Claire v. Claire, 10 Neb., 54.....	104
Clopper v. Poland, 12 Neb., 69.....	532
Com. v. Dennison, 24 How., 97.....	482
Com. v. Hersey, 2 Allen, 180.....	322
Coe v. Peacock, 14 O. S., 187.....	583
Com. v. Webster, 5 Cush., 296.....	732
Commonwealth v. Slack, 19 Pick., 304 .....	319
Connelly v. Doe, 8 Blackf., 320 .....	115
Copwood v. Balton, 26 Miss. (4 Cush.), 212.....	105
Cook v. Cook, 56 Wis., 195 .....	711
Cooley v. Waterman, 16 Mich., 366.....	636
Cottrell v. The State, 9 Neb., 125.....	267

# TABLE OF CASES CITED.

23

	PAGE
Courvoisier v. Bouvier, 3 Neb., 61.....	440
Cox v. Ellsworth, 1 Neb., .....	88
Credit Foncier v. Rogers, 8 Neb., 38.....	148
Crooker v. Melick, 18 Neb., 227.....	155
Crook v. Vandervoort, 13 Neb., 505 .....	698
Cropsey v. Wiggernhorn, 3 Neb., 108.....	582
Crosby v. Roub., 16 Wis., 645.....	643
Cruger v. McLaury, 41 N. Y., 219.....	703
Cunningham v. Tonnemaker, 13 Neb., 462.....	215
Curran v. Wilcox, 10 Neb., 449 .....	396
Curtis v. Cutler, 7 Neb., 318 .....	536
Cuthbert v. Conly, 32 Geo., 211 .....	204

## D.

Danforth v. Penny, 3 Metc., 564.....	183
Darlington v. Taylor, 3 Grant (Pa.), 195.....	105
Davenport v. Davis, 1 M. & W., 570.....	509
Dawson v. Mills, 32 Pa. St., 302.....	703
Delany v. The People, 10 Mich., 241.....	315
Densen v. Hayward, 17 Wend., 67.....	329
Dewey v. Brown, 2 Pick., 387.....	703
DeWitt v. Sewing Machine Co., 17 Neb., 533 .....	246, 677
DeWitt v. Walton, 5 Seld., 571 .....	561
Dobson v. Dobson, 7 Neb., 296.....	396
Dolph v. Barney, 5 Or., 191.....	703
Don Moran v. The People, 25 Mich., 356.....	334
Dorrington v. Minnick, 15 Neb., 398.....	148
Dorrington v. Myers, 11 Neb., 391.....	246, 677, 679
Draper v. Mass. Steam Heating Co., 5 All., 340.....	560
Durban v. Fish, 16 O. S., 534.....	43
Dundy v. Richardson Co., 8 Neb., 508.....	159
Dworak v. Graves, 16 Neb., 706.....	287

## E.

East R. R. Co. v. Benedict, 5 Gray, 561.....	561
Eaton v. Redick, 1 Neb., 305.....	127
Elshire v. Schuyler, 15 Neb., 561.....	190
Elwell v. Chamberlain, 31 N. Y., 611.....	38
Ellwood v. Monk, 5 Wend., 235.....	532
Empkie v. McLean, 15 Neb., 329.....	148

## F.

Farley v. Cleveland, 4 Cowen, 432. ....	532
Farmers Bank v. Bronson, 14 Mich., 360.....	39
Farnam v. Brooks, 9 Pick., 212.....	104

	PAGE
Fenelon v. Hogoboom, 31 Wis., 172.....	127
Fisk v. State, 9 Neb., 62.....	336
Fitzgerald v. Morrissey, 14 Neb., 198.....	532
Foreman v. Byrnes, 68 Ind., 247.....	56
Follmer v. Nuckolls County, 6 Neb., 204.....	268
Fox v. Abbott, 12 Neb., 328.....	677
Fox v. Meacham, 6 Neb., 530.....	393
Frasher v. Ingram, 4 Neb., 531.....	40
Frazier v. Miles, 10 Neb., 109.....	692
F., E. & Mo. V. R. R. Co. v. Brown County, 18 Neb., 516.....	567
Freutz v. Klotsch, 28 Wis., 312.....	636
Friedhoff v. Smith, 13 Neb., 5.....	543
Fuller v. Hooper, 3 Gray, 334.....	560
Fullerton v. Sturgis, 4 O. S., 529.....	439
Fulton v. McCracken, 18 Md., 528.....	415

## G.

Gabe v. State., 1 Eng. (Ark.), 519.....	318
Galor v. McHenry, 15 Ind., 283.....	313
Gardner v. The People, 3 Scam., 89.....	649
Garrison v. The People, 6 Neb., 283.....	336
Garvey v. Fowler, 4 Sandf., 665.....	43
Gates v. People, 14 Ill., 435.....	649
Giffert v. West, 33 Wis., 617.....	545
Glasgow v. Rowse, 43 Mo., 478.....	206
Gold v. Housatonic R. R. Co., 1 Gray, 424.....	183
Goldart v. The People, 106 Ill., 25.....	54
Goldsmith v. Bryant, 26 Wis., 34.....	127
Goodnow v. Empire Lumber Co., 31 Min., 468.....	432
Gorman v. The Judge, etc., 27 Mich., 140.....	35
Gower v. Emery, 18 Me., 79.....	415
Granger v. Swartz, 1 Woolw. C. C., 91.....	728
Grant v. Ramsey, 7 O. S., 157.....	542
Graves v. Scoville, 17 Neb., 593.....	538
Gray v. Givens, 26 Mo., 291.....	703
Gregory v. Whedon, 8 Neb., 373.....	67
Green v. Farmers', etc., Bank, 25 Conn., 451.....	182
Green v. Wilding, 59 Ia., 679.....	432
Greene v. Greene, 11 Pick., 410.....	711
Griffith v. Carter, 8 Kan., 565.....	52
Grimstone v. Carter, 3 Paige, 421.....	438

## H.

Haight v. Lucia et al., 36 Wis., 355.....	134
Hairston v. Hairston, 27 Miss., 704.....	711

# TABLE OF CASES CITED.

25

	PAGE
Hale v. Sherwood, 40 Conn., 332.....	509
Hamilton County v. Bailey, 12 Neb., 56.....	214, 492
Harden v. A. & N. R. R. Co., 4 Neb., 521.....	714
Hardy v. Johnson, 1 Wall. (U. S.), 371.....	703
Harrington v. State, 54 Miss., 490.....	319
Hartley v. Dorr, 15 Neb., 451.....	175
Haskill v. Andros, 4 Vt., 609.....	181
Hastings & G. I. R. R. Co. v. Ingalls, 15 Neb., 129.....	213
Hayden v. Hayden, 46 Cal., 332.....	36
Hays v. Lewis, 17 Wis., 217.....	741
Heisler v. Davis, 3 Yeates, 4. ....	415
Helden v. Helden, 7 Wis., 256; 9 Id., 506; 11 Id., 558.....	588
Hendrickson v. Hinckley, 17 How., 443.....	394
Hiatt v. Brooks, 17 Neb., 33; 22 N. W. R., 73.....	553
Hill v. Loomis, 6 N. H., 263.....	181
Hill v. Ressegien, 17 Barb., 162.....	401
Holmes v. Holmes, 5 Seld., 525.....	43
Halroyd v. Marshall, 10 H. of L. Cases, 191.....	555
Home Ins. Co. v. Augusta, 50 Geo., 530.....	204
Hooper v. Browning, 27 N. W. R., 419.....	721
Hopkins v. Garrard, 7 B. Mon., 312.....	438
Horacek v. Keebler, 5 Neb., 536.....	582
Horn v. Queen, 4 Neb., 108.....	394
Hosford v. Stone, 6 Neb., 380.....	582
Hosley v. Black, 28 N. Y., 438.....	43
Howson v. Hancock, 8 T. R., 575.....	509
Hoyt v. Commissioners, 23 N. Y., 224.....	56, 57
Huffman v. Koppelkom, 8 Neb., 344.....	328
Hughes v. Railway Co., 15 A. & E. R. R. Cases, 461.....	622
Huguenin v. Baseley, 14 Ves., 273.....	299, 301
Hunt v. Penn. R. R. Co., 51 Penn. St., 475.....	624
Hunter v. Leahy, 18 Neb., 80.....	677
Hunter v. Supervisors, 33 Ia., 376.....	57
Hutchins v. State, 8 Mo., 288....	696

## I.

Ill. Cent. R. R. Co. v. McCullough, 59 Ill., 166.....	438
---	-----

## J.

Jackman v. Kingland, 4 Watts & Serg., 149.....	441
Jenkins v. Jenkins, 12 Ia., 195.....	432
Jennings v. Gage, 13 Ill., 610.....	439
Jennings v. Johnson, 17 Ohio, 154.....	583
Jones v. Hurlbut, 13 Neb., 131.....	236
Jones v. Jones, 46 Ia., 466.....	432
Jones v. The State, 14 Neb., 210.....	267

	PAGE
Jones v. Winchester, 6 N. H., 497.....	183
Johnson v. Phifer, 6 Neb., 406.....	116
Johnson v. Gold, 21 N. W. R., 719.....	735
Joslin v. Miller, 14 Neb., 91.....	38
Judson v. Esland, 1 Ala., 71.....	137

## K.

Keech v. Sandford, Leading Cases in Equity, 196.....	637
Kennicott v. The Supervisors, 16 Wall., 452.....	643
Kenyon v. Williams, 19 Ind., 45.....	561
Kerkow v. Bauer, 15 Neb., 150.....	190
Kiney v. Degman, 12 Neb., 237.....	354
Kirkpatrick v. Turnbull, 4 Add. (Penn.), 260.....	104
Kitsen v. The Mayor, 26 Mich., 325.....	206
Kleeman v. Peltzer, 17 Neb., 381.....	301, 436
Koplitz v. Gustavus, 48 Wis., 48.....	542
Kountz v. State, 8 Neb., 294.....	646
Kronenberger v. Binz, 56 Mo., 121.....	104

## L.

Lanbren v. Watson, C. H. & Jonn., 255.....	441
Lammers v. Nissen, 4 Neb., 245.....	727
Lane v. Bowland, 2 Shepley, 77.....	439
Larney v. Mooney, 50 Cal., 610.....	714
LaTrobe v. Baltimore, 19 Md., 13.....	52
LaTrobe v. Hayward, 13 Fla., 190.....	104
Lawrence v. Fox, 20 N. Y., 268.....	532
Lawrence v. Smith, 45 N. H., 533.....	183
Lickbarrow v. Mason, 2 F. R., 70.....	439
Livingston v. Wootan, 1 Nott & Mc., 178.....	509
Lockwood v. Lockwood, 22 Conn., 425.....	543
Lohman v. The People, 1 Const., 379.....	651
Long v. Clapp, 15 Neb., 420.....	545
Long v. State, 17 Neb., 60.....	482
Long & Smith v. Clapp, 15 Neb., 417.....	745
Londerbach v. Boyd, 1 Ashmead, 380.....	396
Lord Wellesley v. Earl of Mornington, 11 Beav., 181.....	132
Lottnam v. Barnett, 62 Mo., 159.....	36
Lounsbery v. Sayder, 31 N. Y., 514.....	543
Loveridge v. Cooper, 3 Russ., 30.....	439
Lowe v. Stringham, 14 Wis., 241.....	181
Lytile v. Arkansas, 9 How., 333.....	396

## M.

Martin v. Coppock, 4 Neb., 173.....	36
-------------------------------------	----

# TABLE OF CASES CITED.

27

	PAGE
Martin v. Seeley, 15 Neb., 136.....	602
Mathews v. Smith, 13 Neb., 190.....	183
Mathews v. State, 19 Neb., 330.....	462
Mattis v. Robinson, 1 Neb., 1.....	39
McAfee v. Kentucky University, 7 Bush., 135.....	711
McCafferty v. Spuyten Duyvil R. R. Co., 61 N. Y., 178.....	624
McCallum v. Gouley, 8 Johns., 147.....	509
McCormick v. Malin, 5 Blackf., 509.....	300
McDowell v. Gregory, 14 Neb., 33.....	412
McGavock v. Pollack, 13 Neb., 535.....	691, 692
McGuire v. Com., 3 Wall., 387.....	205
McHugh v. Smiley, 17 Neb., 620-626.....	438, 677, 680
McKinzie v. Perrill, 15 O. S., 168.....	438
McLaughlin v. Sandusky, 17 Neb., 110.....	175
McNamee v. The People, 31 Mich., 473.....	323
Meredith v. Kennard, 1 Neb., 319.....	619
Merrick Co. v. Batty, 10 Neb., 176.....	258
Metz v. State Bank, 7 Neb., 165.....	306, 657
Miller v. Curry, 17 Neb., 321.....	677
Miller v. Hall, 1 Bush. (Ky.), 230.....	687
Miller v. Hurford, 13 Neb., 23.....	720
Miller v. Probst, 4 Add. (Penn.), 344.....	104
Miller v. Roby, 9 Neb., 471.....	344
Mills v. Rice, 3 Neb., 76.....	576
Miner v. The People, 58 Ill., 60.....	313
Mineral Pt. R. R. Co. v. Barrow, 83 Ill., 365.....	181
Mitchell v. Brownberger, 2 Nev., 345.....	415
Mo. P. Ry. Co. v. Maltby, 8 Pac. Rep., 235.....	180, 183
Morrison v. Hogue, 49 Ia., 574.....	532
Morton v. Rogers, 14 Wend., 576.....	104
Moser v. Jenkins, 5 Or., 447.....	714
Munson v. Carter, 19 Neb., 293.....	436
Murphy v. State, 15 Neb., 383.....	336

## N.

Napier v. Hodges, 31 Tex., 287.....	204, 205
Nat. Exp. Co. v. Drew, 32 Eng. Law and Eq., 1.....	38
Nave v. Baird, 52 Ind., 318.....	415
Neihardt v. Kilmer, 12 Neb., 38.....	344, 619
Nelson v. Garey, 15 Neb., 531.....	48
Newman v. Mueller, 16 Neb., 523.....	175
New Orleans v. United States, 10 Peters, 717.....	728
Nichols v. Alsop, 6 Conn., 477.....	104
Noble v. Houk, 16 S. & R., 421.....	396
N. E. Mtge. Sec. Co. v. Hendrickson, 14 Neb., 159.....	38
Nye v. Liscombe, 21 Pick., 263.....	183

## O.

	PAGE
Oakley v. Morton, 11 N. Y., 26.....	43
O'Hara v. Wells, 14 Neb., 403.....	536
Oleson v. State, 11 Neb., 276.....	332, 336, 337
Oliver v. Sheeley, 11 Neb., 522.....	148
Ould v. Richmond, 23 Gratt., 464.....	204

## P.

Page v. Webster, 8 Mich., 263.....	636
Palmer v. Dodge, 4 O. S., 21.....	439
Parks v. W. Cent. R. R. Co., 33 Wis., 413.....	292
Paul v. Reed, 52 N. H., 136.....	127
Paulett v. Peabody, 3 Neb., 196.....	40
Pell v. McElroy, 36 Cal., 268.....	438
Pentz v. Stanton, 10 Wend., 271.....	561
People v. Abbot, 9 Wend., 194.....	333
People v. Benson, 6 Cal., 221.....	334
People v. Bransby, 32 N. Y., 525, 531, 540.....	333
People v. Brown, 47 Cal., 447.....	334
People v. Commissioners, 4 Neb., 161.....	258
People v. Compton, 1 Duer (N. Y.), 555.....	134
People v. Crosswell, 13 Mich., 427, 433.....	333
People v. Dohring, 59 N. Y., 382.....	333
People v. Eastman, 25 Cal., 603.....	52
People v. Gardner, 51 Barb., 352.....	57
People v. Goodrich, 79 Ill., 148.....	608
People v. Hulse, 3 Hill, 316.....	333, 334
People v. Levison, 16 Cal., 98.....	732
People v. Martin, 60 Cal., 153.....	207
People v. McGowan, 17 Wend., 386.....	651
People v. Morris, 13 Wend., 337.....	251
People v. Morrison, 1 Park. Cr., 626.....	334
People v. Phipps, 39 Cal., 326.....	732
People v. President, 9 Wend., 351.....	251
People v. Rickert, 8 Cowen, 226.....	543
People v. Steele, Edmund's Select Cas., 505.....	151
People v. Throop, 12 Wend., 183.....	151
People v. Trustees, etc., 48 N. Y., 390.....	55
People v. Wilbur, 4 Parker's Cr., 19.....	320
Perkins v. Eaton, 3 N. H., 152.....	509
Perkins v. Hart, 11 Wheat., 237.....	104
Pervear v. Com., 5 Wall., 475.....	205
Phillips v. State, 17 Geo., 461.....	322
Pickney v. Henegan, 2 Strob., 250.....	152
Pleasant v. State, 8 Eng., 360.....	334



# TABLE OF CASES CITED.

29

	PAGE
Potter v. McDowell, 31 Mo., 62 .....	40
Powell and Brigham v. McDowell, 16 Neb., 424.....	412
Purcell v. Sparks, 82 Ill., 346.....	444

## R.

Rabe v. Fyler, 10 Smedes & M., 446 .....	703
Railroad Co., v. McPherson, 12 Neb., 480.....	396
Rawalt v. Brewer, 16 Neb., 444.....	79
Ray v. Mason, 6 Neb., 102.....	148
Reg v. Hallett, 9 C. & P., 748.....	333
Reineman v. C. C. & B. H. R. R. Co., 7 Neb., 310.....	240
Rembert v. Brown, 17 Ala., 667.....	104
Reemie v. Reemie, 4 Mass., 586.....	714
Resor v. O. & M. R. R. Co., 17 O. S., 139.....	439
Rex v Lloyd, 7 Carr and P., 318.....	333
Rice v. Rice, 2 Drew., 73.....	438
Rickards v. Cunningham, 10 Neb., 420.....	441
Ring v. Gibbs, 26 Wend., 502.....	329
Roberts v. State, 14 Geo., 8.....	652
Roberts v. Swearingen, 8 Neb., 363.....	36
Roberts v. Totten, 13 Ark., 609.....	104
Roberts v. Thorn, 25 Tex., 728.....	637
Robertson v. Robertson, 9 Watts, 32.....	441
Robinson v. Cheney, 17 Neb., 673.....	60, 61
Robinson v. Willoughby, 67 N. C., 84 .....	36
Rochester Bank v. Suydam, 5 How. Pr., 254.....	415
Roehl v. Roehl, 15 Neb., 655 .....	491
Romberg v. Hughes, 18 Neb., 579.....	532
Root v. French, 13 Wend., 572.....	439
Rucker v. Supervisors, 7 W. Va., 661.....	444
Ruffner v. Hewitt, 7 W. Va., 585.....	105
Rush v. Valentine, 12 Neb., 573.....	354

## S.

Sage v. Quay, 1 Clarke's Ch., 242.....	134
Saltus v. Everett, 20 Wend., 267.....	439
Sands v. Sands, 24 Am. Law Reg., 544.....	301
St. Louis v. Spiegel, 75 Mo., 145.....	206
S. P. L. Co. v. Buffalo Co., 7 Neb., 253.....	228
Satterlee v. Bliss, 36 Cal., 489.....	415
Sawyer v. Thompson, 24 N. H., 510.....	183
Schaetzel v. Germantown Ins. Co., 22 Wis., 412.....	714
School District v. Collins, 16 Kan., 406.....	565
Schuyler v. Leggett, 2 Cowen, 660.....	542
Schuyler v. Smith, 51 N. Y., 309.....	287

	PAGE
Selser v. Brock, 3 O. S., 302.....	439
Sessions v. Irwin, 8 Neb., 5.....	38
Saxon v. Kelley, 3 Neb., 104.....	327
Shirk's Appeal, 3 Brewst., 119.....	104
Singer Mfg. Co. v. Doggett, 16 Neb., 609.....	44
Singleton v. Boyle, 4 Neb., 414.....	582
Slawson v. Loring, 5 Allen, 340.....	561
Slocum v. Marshall, 2 Wash. C. C. R., 397.....	301
Smiley v. Sampson, 1 Neb., 56.....	354
Smiley v. Sampson, 1 Neb., 83.....	396
Smith v. Brown, 17 Barb., 431.....	43
Smith v. Kay, 7 H. L. Cas., 799.....	302
Smith v. State, 24 Ind., 101.....	503
Snyder v. W. U. R. Co., 25 Wis., 60.....	292
South Platte Land Co. v. Buffalo Co., 7 Neb., 253.....	159
Souverbye v. Arden, 1 Johns. Ch., 255.....	115
Spice v. Steinruck, 14 O. S., 213.....	35
Sproul v. McCoy, 26 O. S., 577.....	181
Stackpole v. Arnold, 11 Mass., 27.....	561
State v. Alexander, 14 Neb., 280.....	240
State v. Board of Supervisors, 21 Wis., 449.....	503
State v. Burgdorf, 53 Mo., 65.....	333
State v. Canada, 27 N. W. R., 288.....	732
State v. Commissioners of Cass Co., 12 Neb., 54.....	168
State v. Co. Court, 47 Mo., 594.....	54
State v. Cutler, 13 Kan., 131.....	134
State v. Earl, 1 Nev., 394.....	52
State v. Ensign, 11 Neb., 531.....	450
State v. Jackson, 39 Conn., 229.....	321
State v. Lancaster Co., 6 Neb., 214.....	236
State v. Lancaster Co., 13 Neb., 223.....	482
State v. Lancaster Co., 17 Neb., 85.....	323
State v. Lewis, 2 Hawks, 98.....	651
State v. McKinney, 13 Kas., 576.....	649
State v. Murphy, 6 Ala., 765.....	334
State v. Kendall, 15 Neb., 262.....	258
State v. R. V. R. R. Co., 17 Neb., 647.....	484
State v. Reynolds, 18 Neb., 431.....	169
State v. Sovereign, 17 Neb., 173.....	569
State v. Townsends, 2 Haw. (Del.), 546.....	651
State v. Way, 5 Neb., 283.....	309, 313
State v. Wilcox, 17 Neb., 219.....	202
State v. Whedon, 13 Neb., 57.....	258
State v. York County, 13 Neb., 65.....	256
State Bank v. Green, 10 Neb., 134.....	687
State, ex rel., v. Judges, 19 Neb., 149.....	447, 449

# TABLE OF CASES CITED.

31

	PAGE
Stephen v. Anderson, 12 Neb., 86.....	214
Stephens v. Vroman, 16 N. Y., 381.....	428, 721
Stevens v. Brooks, 23 Wis., 199 ..	35
Stout v. Rapp, 17 Neb., 469.....	679
Sullivan v. The State, 32 Ark., 190.....	313
Sumner v. State, 5 Blackf., 579 .....	732
Supervisors v. Davenport, 40 Ill., 197 .....	56
Sutcliffe v. Dohrman, 18 Ohio, 186.....	583
Swallow v. Thomas, 15 Kan., 68.....	52

## T.

Tabor v. Cannon, 8 Metc., 456.....	561
Tappan v. Bank, 19 Wall., 490.....	52
Taylor v. State, 50 Geo., 79.....	334
Taylor v. Taylor, 8 How., 183.....	300
Terry v. Sickles, 13 Cal., 427.....	105
Thayer v. Boyle, 30 Me., 479.....	651
Thomson, ex parte, 16 Neb., 238.....	323
Thurston v. Mauro, 1 Greene (Iowa), 231.....	561
Tingley v. Bateman, 10 Mass., 343.....	183
Traver v. Merrick Co., 14 Neb., 327.....	228
Tucker Manf. Co. v. Fairbanks, 98 Mass., 101.....	561

## U.

Underwood's Case, 21 Tenn. (2 Humph.), 45.....	133
U. P. R. R. v. Colfax County, 4 Neb., 450.....	228, 237

## V.

Varney v. Varney, 58 Wis., 19.....	715
Vanzant v. The Aug. Min. Co., 2 McCrary, 643.....	134

## W.

Wabash Elevator Co. v. First Nat. Bank of Toledo, 23 O. S., 318.....	127
Wake v. Griffin, 9 Neb., 47.....	518
Walbridge v. State, 13 Neb., 236.....	731
Walcott v. The People, 17 Mich., 68.....	206
Warner v. Cammack, 27 Ia., 642.....	246
Warren v. Charlestown, 2 Gray, 104.....	251
Warrick v. Rounds, 17 Neb., 416.....	190
Wasson v. Palmer, 13 Neb., 376.....	619
Welton v. Beltezore, 17 Neb., 402.....	583
Wendover v. Lexington, 15 B. Mon., 258.....	204
Whelan v. Whelan, 3 Cow., 537.....	298

	PAGE
White v. Hampton, 10 Ia., 238.....	105
White v. Rourke, 11 Neb., 521.....	491
Whitehorn v. Hines, 1 Munford, 577.....	301
Whitney v. State, 35 Ind., 506.....	334
Whittaker v. State, 50 Wis., 518.....	334
Wilcox v. Ellis, 14 Kas., 588.....	55
Wilcox v. Saunders, 4 Neb., 569.....	450
Williams v. Lowe, 4 Neb., 382.....	713
Williams v. Robbins, 16 Gray, 77.....	561
Wilson v. Wilson, Wright, 128-9.....	714
Woodin v. The People, 1 Park. Cr., 464.....	334
Wright v. Germain, 21 Ia., 585.....	432
Wright v. The People, 4 Neb., 407.....	618
Wright v. C. B. & Q. R. R. Co., 19 Neb., 176.....	246

## Y.

Young v. Catlett, 6 Duer, 437.....	714
Youngblood v. Sexton, 32 Mich., 406.....	204

# CASES

## ARGUED AND DETERMINED

### IN THE

# SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1886.

#### PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.

" M. B. REESE,

" AMASA COBB,

} JUDGES.

**MATTHEW McKEIGHAN, APPELLANT, v. PITT H.  
HOPKINS, APPELLEE.**

1. **Petition: AMENDMENT: PETITION IN EJECTMENT.** A court may permit a petition to be amended when the proposed amendment does not change substantially the claim, although the form of the action may be changed. So long as the identity of the cause of action is preserved, the form of the action is not material. A petition in ejectment, therefore, may be amended to be a petition to redeem—the object in both cases being to recover the land.
2. ———: ———: **STATUTE OF LIMITATIONS.** In such case the statute of limitations ceases to run against the claim when suit is properly brought thereon.
3. **Principal and Agent: FRAUD OF AGENT: LIABILITY OF PRINCIPAL.** A party cannot retain the benefits derived from the fraudulent conduct of his agent, without being chargeable with the instrumentalities employed to effect the purpose.

19	33
25	338
19	33
28	652
28	693
19	33
35	86
35	416
19	33
41	876
19	33
45	719
19	33
50	64
52	407
19	33
58	104
19	33
60	212

4. **Judicial Sale: APPRAISEMENT.** When real estate is to be sold as that of the debtor, it is to be appraised as his, and the appraisers have no authority to consider an adverse claim of title.
5. **Mortgage Foreclosure by Mortgagee in Possession.** A mortgagee in possession seeking to enforce his mortgage upon real estate by a decree of foreclosure and sale, occupies a trust relation in regard to the property, and cannot as against the mortgagor, while treating the mortgage as valid, hold adversely as to him.
6. **Judicial Sale.** An appraiser is prohibited by statute from purchasing property appraised by him, and every purchase so made will be considered fraudulent and void.
7. ———: **CONFIRMATION.** The confirmation of a sale cures all irregularities in the proceedings; but such sale may be afterwards set aside, in a proper case, for fraud. Rule applied and mortgagor allowed to redeem.

APPEAL from the district court of Johnson county.  
Tried below before BROADY, J.

*T. Appelget & Son*, for appellant.

*S. P. Davidson*, for appellee.

MAXWELL, CH. J.

This case was before this court in 1883, and is reported in 14 Neb., 361, the judgment of the district court being reversed and the plaintiff given leave, upon the payment of all costs, to amend his petition by filing a bill to redeem. An amended petition was filed by the plaintiff, to which the defendant filed an answer. On the trial of the cause the court found the issues in favor of the defendant, and dismissed the action. The plaintiff appeals.

The defendant contends that as the former action was at law the petition cannot be amended by substituting therefor an action in equity, and *Carmichael v. Argard*, 52 Wis., 609, *Board of Supervisors v. Decker*, 34 Id., 380,

*Stevens v. Brooks*, 23 Id., 199, and *Gorman v. The Judge*, etc., 27 Mich., 140, are cited to sustain the position.

Sec. 144 of the code provides that, "the court may either before or after judgment, *in furtherance of justice* and on such terms as may be proper, amend any pleading, process, or proceeding by adding to or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

Judge Bliss, in his valuable work on Code Pleading, sec. 429, says: "The supreme court of Wisconsin, in limiting amendments, has been somewhat strict in construing the term 'cause of action.'"

This certainly is true of the early decisions of that court. See cases cited in note 3, sec. 564, Pomeroy's Remedies, etc. At the present time, however, the tendency of decisions in that state seems to be in favor of a more liberal construction of the code. But, however this may be, the code abolishes the distinction between actions at law and suits in equity. If, therefore, an action at law is brought to recover a tract of land, the court certainly has the power to permit the plaintiff to amend his petition so that he may recover the same either at law or in equity. The right to be enforced is the same in either case—the recovery of the land, and so long as the identity of the cause of action is preserved the petition may be amended by stating such facts as the plaintiff may believe to exist in his favor, to entitle him to the relief sought. The restriction in the section above quoted does not refer to the *form* of the remedy but to the identity of the transaction. *Spice v. Steinruck*,

14 O. S., 213. *Lottnam v. Barnett*, 62 Mo., 159. *Hayden v. Hayden*, 46 Cal., 332. *Ballard v. Johnson*, 65 N. C., 436. *Robinson v. Willoughby*, 67 Id., 84.

In the case last cited an action of ejectment was brought to recover possession of the land. On appeal the court held that the deed was in fact a mortgage, and reversed the judgment in favor of the plaintiff. Prior to the second trial an amendment was permitted, changing the form of the action from ejectment to that of foreclosure of mortgage. See also *Roberts v. Swearingen*, 8 Neb., 363. Maxwell's Pl. and Pr. (4th ed.), 174, 175. The authority to grant leave to amend the petition, therefore, is clearly conferred.

1. The appellee claims, however, that even if it is conceded that the court had authority to authorize the amendment in question, still the statute of limitations would run against the cause of action until the amended petition was filed.

In *Martin v. Coppock*, 4 Neb., 173, it was held that the amendment of a mistake in the name of the plaintiff related back to the date of service; and this we think is the general rule. The plaintiff sought in the original petition to recover the land, because he was the owner thereof; and in the amended petition filed by him by leave of court he seeks to recover the land in question, upon the ground that he is the owner of the same, but while asking equity he offers to do equity by paying the defendant all valid claims held by him against the land. The cause of action is the same, although the relief is sought in a different manner from that in the first petition. This, however, does not change the cause of action, and the statute of limitation ceased to run when the summons which was served on him was issued, or if the service was constructive at the date of the first publication of the notice. Code, § 19.

2. It is claimed by the appellant that the appellee obtained the land in question by collusion and fraud. The testimony in the abstract tends to prove the following facts:



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McKeighan v. Hopkins.

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That in the appraisalment under the decree of foreclosure the value of the land in controversy was found to be \$872.15.  
 Prior incumbrance, tax lien.....\$22.15  
 Tax title of Pitt H. Hopkins.....

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 Interest of Mathew McKeighan.....\$10.00

The land was sold to J. W. Buffum, one of the appraisers, for \$156. Buffum testifies that he purchased the land and afterwards sold and conveyed the same by quit-claim deed to the appellee, and received \$800 in cash. The attorney for the appellee when the appraisalment was made testified on cross-examination, as appears by the abstract, as follows: "Joseph Buffum, the purchaser at the sale above mentioned, is the same person who was one of the appraisers who actually appraised the land in controversy, and the sale was made under that appraisalment. The sheriff or deputy sheriff consulted me as to the value of the incumbrances on the premises, and I think the incumbrances were valued in accordance with my suggestions and advice. Further than this I had nothing to do with the appraisalment. I may have assisted in preparing the papers. I was the attorney for Hopkins in the foreclosure suit under which the land was being sold. I do not think I gave the sheriff the advice spoken of as the attorney of Hopkins. I know there was no other appraisalment made on the land in controversy prior to the sale to Buffum." He also testifies that he was present and did all the business for Hopkins, and that the purchase of the land by Buffum was a surprise to him. Hopkins also swears that "never a word passed between Buffum and myself about the appraisalment or purchasing of the land. I was not there from before the foreclosure suit was begun until after the sale." He also testifies that he never authorized his attorney "to do anything in regard to the appraisalment or selection of appraisers, or the writing of the appraisalment. I simply put the mortgage in his hands for foreclosure in a legal manner."

It can make no difference so far as the liability of the

defendant is concerned, whether he authorized his attorney to procure the interest of the plaintiff to be appraised at a merely nominal sum or not, as he cannot avail himself of such conduct without being charged with all the instrumentalities employed by his agent to effect the purpose. *Joslin v. Miller*, 14 Neb., 91. *Elwell v. Chamberlain*, 31 N. Y., 611. *Nat. Exp. Co. v. Drew*, 32 Eng. Law and Eq., 1.

A principal will not be permitted to accept and confirm so much of a contract made by an agent as he thinks beneficial to him and reject the remainder. *N. E. Mtge. Sec. Co. v. Hendrickson*, 14 Neb., 159, and cases cited. The defendant, therefore, in obtaining the land for about one-third of its appraised value, is chargeable with the instrumentalities employed by his agent in the appraisal of the land. The property was to be appraised as belonging to the debtor. The statute authorizes the appraisers to deduct the value of liens, except those under which the property is being sold, from the gross value. But adverse titles cannot be considered. *Sessions v. Irwin*, 8 Neb., 5. Tax deeds are not liens or incumbrances within the meaning of the statute. *Id.* Here was a mortgagee claiming the premises adversely under a tax deed, but at the same time seeking to foreclose his mortgage thereon, and have the premises sold. Had a sale been made to a *bona fide* purchaser the defendant's entire interest would have been conveyed by the sheriff's deed. Code, § 853. Yet he failed to set up such interest in his petition or make any claim therein for the same. If the defendant's tax deed was valid the entire interest of the plaintiff would have been conveyed thereby, and his interest would have been of no value whatever.

The character of a mortgagee seeking to enforce his mortgage against the real estate is inconsistent with a claim of title by adverse possession. The mortgagee by accepting a deed from his mortgagor assents to and cannot deny the

mortgagor's title. *Brown v. Combs*, 5 Dutch., 36-42. 2 Wash. R. P. (4 Ed.), 169. *Mattis v. Robinson*, 1 Neb., 1. So if he enter into possession as mortgagee under his mortgage he will not be permitted to deny the title of his mortgagor, and any release which he may obtain from others will go to strengthen his mortgagor's title. *Farmers Bank v. Bronson*, 14 Mich., 360. 2 Wash. R. P., 169. *Mattis v. Robinson*, 1 Neb., 1. The reason is, that under the common law, where the mortgagee was entitled upon default to enter into possession, he held the premises in trust for the payment of the mortgage debt, and this relation continued until terminated by the action of the parties or the decree of a court. Cases are to be found where the mortgagee was permitted to hold adversely, but in all of them the trust relation had not been recognized for so long a period that the bar by adverse possession was complete. But I think no case can be found where a mortgagee claimed rights under a subsisting mortgage, and also adversely to the mortgagee. It was the duty of the defendant, therefore, to have set up all his claims for taxes paid in his petition to foreclose the mortgage, and had the amount of the same included in the decree, and the land sold as the property of the mortgagor, any surplus that remained after paying the mortgagee's claims would belong to the mortgagor.

Sec. 503 of the code provides that, "no sheriff or other officer making the sale of property, either personal or real, or any *appraiser* of such property, shall either directly or indirectly purchase the same; and every purchase so made shall be considered fraudulent and void."

In this case the purchase was not only made by an appraiser, who had fixed the value of the plaintiff's property, under the advice, apparently, of the defendant's attorney, at a merely nominal sum, but the price paid was less than one-fifth of its appraised value. Apparently a fraud on the plaintiff was intended, and the mere denial of such in-

tent does not overcome the presumption arising from the conduct of the defendant's agents.

Suppose an insolvent debtor should give away his property, or a considerable part of it, and thus deprive his creditors of the means of enforcing payment, would a denial of the intent to defraud be a defense against such creditors? That it would not will be conceded, because the intent to defraud is a conclusion of law, arising from the conduct of the debtor. *Babcock v. Eokler*, 24 N. Y., 623. *Potter v. McDowell*, 31 Mo., 62. So in this case the fraudulent intent is a conclusion of law, arising from the conduct of the defendant and his agents.

It is contended on behalf of the appellee that even if there was fraud in the sale under the decree, still the confirmation of the sale cured the defect, and the question is not now open to inquiry.

Sec. 498 of the code provides that, "if the court upon the return of any writ of execution or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied with the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements," etc.

This merely applies to the regularity of the proceedings. No doubt fraud may be shown to defeat the confirmation, as in *Paulett v. Peabody*, 3 Neb., 196. But the facts constituting the fraud or mistake may not be known at that time, yet if made to appear afterwards within a reasonable time, and are sufficient to authorize the cancellation of the sale, relief will be granted. *Frasher v. Ingham*, 4 Neb., 531. Particularly is this true where the entire proceedings are *ex parte* and the party to be affected has no actual notice of the proceedings. We hold, therefore, that the ap-

praisement and sale of the property to an appraiser were fraudulent, and that the appellee is chargeable with the fraudulent acts of his agent, whereby the property was appraised and sold at a merely nominal sum, and that he is not a *bona fide* purchaser.

The judgment of the district court is reversed, and a decree will be entered in this court in favor of the plaintiff, upon his paying to the clerk of this court, within ninety days, for the use of the defendant, the amount of the decree of foreclosure, with legal interest thereon, and all taxes paid by said defendant upon said land, together with 12 per cent interest thereon. We find no claim in the petition for the rental value of said land, although there is some proof upon that point, yet as the question was not presented to the court below it will not be considered here.

DECREE ACCORDINGLY.

THE other judges concur.

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L. H. EVARTS, PLAINTIFF IN ERROR, v. W. B. SMUCKER,  
DEFENDANT IN ERROR.

1. **Petition on Modified Contract.** Where the conditions of a contract have been altered by the consent of the parties, the contract as modified should be set out in the petition, and then an allegation of performance may be made. Such modified contract should not be set up in the reply if inconsistent with the allegations of the petition.
2. **Petition: AMENDMENT.** Where evidence has been received without objection the court may after verdict permit the petition to be amended to conform to the facts proved.

**ERROR** to the district court of Richardson county. Tried below before GASLIN, J., sitting for BROADY, J.

*E. W. Thomas and C. Gillespie*, for plaintiff in error.

*Frank Martin and J. D. Gilman*, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Richardson county by the defendant in error against the plaintiff to recover the sum of \$473.50, as a balance due for certain material furnished and labor performed on a house of the plaintiff in error in pursuance of the terms of a certain contract in writing, a copy of which is set out in the record. The plaintiff below alleged in his petition that he had performed all the stipulations of said contract on his part to be performed. The defendant below in his answer admitted the written contract, but alleged that the plaintiff had failed to comply with its terms and conditions, and stated specifically the particulars in which he alleged there was a failure, and claimed that he had sustained damages to the amount of \$500. The plaintiff below in his reply admitted that the work was not done as required by the contract, but alleged that the defendant had caused certain changes to be made in the plans and specifications, and that the work was performed in accordance with such changes. The defendant below thereupon filed a motion to strike out of the reply all matter relating to change in the plans and specifications, for the reason that the same was a departure from the petition.

1. It is claimed by the plaintiff in error that this motion was overruled, but in this he is evidently mistaken, as the record (page 11) shows that the motion was sustained. This motion was sustained on the 10th of October, 1884. A jury was thereupon impaneled, and the trial proceeded. On the next day, and after the jury had returned their verdict, the plaintiff below filed an amended petition, in which the variations from the contract are set out, and a

compliance averred with the contract as modified. A motion was thereupon filed by the defendant below to strike this petition from the files, because it "was filed by plaintiff after the verdict of the jury was returned and accepted by the court." The motion was overruled, and this is assigned for error. The jury returned a verdict in favor of the plaintiff below for the sum of \$410.50, and judgment was rendered thereon.

The principal errors relied on are the failure to strike the erroneous matter from the reply, and the filing of the amended petition after the return of the verdict. As stated above, the motion to strike the matter inconsistent with the petition out of the reply was sustained. The reply must be consistent with the petition, and if modifications have been made in the contract, and it is sought to recover upon the contract as modified, the contract as changed should be pleaded, and an allegation that the plaintiff has duly performed. *Durbin v. Fisk*, 16 O. S., 534. *Smith v. Brown*, 17 Barb., 431. *Hosley v. Black*, 28 N. Y., 488. *Oakley v. Morton*, 11 Id., 26. *Holmes v. Holmes*, 5 Seld., 525. *Garvey v. Fowler*, 4 Sand., 665. Swan's Pl. and Pr., 208. Maxwell's Pl. and Pr. (4 Ed.), 92-230. And this was the course pursued in this case in filing the amended petition.

2. That the court erred in permitting the amended petition to be filed after verdict. It will be observed that the only ground of the motion to strike the petition from the files is, that it was filed after the verdict was received. There is no claim that it includes matter not presented to the jury for determination. It was claimed on the argument that such was the case, but an examination of the evidence of the plaintiff below as to the modifications of the contract shows that every modification and change was fully proved and established by his testimony, without objection being made. This being so, the court had authority to permit an amended petition to be filed to conform to

the facts proved. *Catron v. Shepherd*, 8 Neb., 308. *Singer Mfg Co. v. Doggett*, 16 Neb., 609.

3. Some objection is made to the exclusion of the testimony of certain alleged experts. In what the exclusion consists does not appear. These witnesses did testify and seem to have given their opinions, whether admissible or not. The principal defect complained of was the settling of a certain chimney in the middle of the building, which chimney contains about seven thousand brick. The settling is admitted, but it is claimed by the plaintiff below that this was caused by the defective foundation, and that he followed the plans and specifications in the construction of said chimney, and therefore is not responsible. In this we think he is sustained by the evidence. On the whole case it is apparent that there is no material error in the record, and that justice has been done. The judgment of the court below is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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31	533
19	44
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40	896
19	44
44	887
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45	140
29	44
49	637
50	419
51	930
19	44
58	518

WILLIAM B. GRIMES & Co., PLAINTIFFS IN ERROR, v.  
FARRINGTON BROS., DEFENDANTS IN ERROR.

A. FRANK & SONS, PLAINTIFFS IN ERROR, v. FAR-  
RINGTON BROS., DEFENDANTS IN ERROR.

A. B. SYMNS & Co., PLAINTIFFS IN ERROR, v. FAR-  
RINGTON BROS., DEFENDANTS IN ERROR.

TOOTLE, HANNA & Co., PLAINTIFFS IN ERROR, v. FAR-  
RINGTON BROS., DEFENDANTS IN ERROR.

1. **Fraud:** ATTACHMENT: MOTION TO DISCHARGE: BURDEN OF  
PROOF. The question of fraudulent intent in the transfer or con-



veyance of property is one of fact, to be decided by the trial court as any other question of fact. Where, on the hearing of a motion to discharge an attachment procured upon an allegation of the fraudulent disposition of property, the averments of such affidavit are denied by the attachment defendant, the burden of proof to establish the fact charged is upon the plaintiff in the action, and the motion to discharge should be sustained, unless such proof is made by a preponderance of testimony. In such case an order discharging the attachment will not be reversed unless against the weight of evidence.

2. **Assignment: PREFERRING CREDITORS.** A debtor has the right to secure a part of his creditors in preference to others, by the conveyance or mortgage of property. The fact of such preference will not of itself render such conveyance or mortgage fraudulent as to other creditors.
3. **Attachment: MOTION TO DISCHARGE: RIGHTS OF MORTGAGOR.** A mortgagor of personal property upon which an attachment issued against him has been levied, has the right, under the provisions of section 235 of the civil code, to resist the attachment by a motion to discharge the same, upon the ground that the allegations of fraud upon which the order of attachment was procured are untrue.

ERROR to the district court for Richardson county.  
Tried below before BROADY, J.

*Isham Reavis, A. Schoenheit, and E. W. Thomas*, for plaintiffs in error, contended: 1. That the mortgage given should be construed as an assignment in its legal effect. *Brown v. Webb*, 20 Ohio, 389. *Bates v. Coe*, 10 Conn., 293. *Perry v. Holden*, 22 Pick., 269. *Wallach v. Wylie*, 28 Kan., 138. *Winstead v. Hulme*, 32 Kan., 572. *Jeffrey v. Greenbaum*, 20 N. W. R., 775. 2. That defendants could not be heard for the purpose of having the attachment dissolved. *Chandler v. Noah*, 5 Mich., 409. *Price v. Reed*, 20 Mich., 72. *Mitchell v. Skinner*, 17 Kan., 563. *Long v. Murphy*, 27 Kan., 375.

*Frank Martin*, for defendants in error, cited: *Lininger v. Raymond*, 12 Neb., 25. *Nelson v. Garey*, 15 Neb., 531. *Meyer v. Zinger*, 25 N. W. R., 727.

REESE, J.

These cases being argued and submitted together and presenting the same questions will be disposed of in the same way. The questions presented by the brief of plaintiffs in error will be noticed in the order in which they there occur therein.

Certain attachments were issued from the district court of Richardson county in actions brought by plaintiffs in error, which were, upon motion of defendants in error, discharged by the order of the judge of the first judicial district. This ruling of the district judge is assigned as error, and is brought to this court for review. The affidavits upon which the attachments were issued allege and charge, in substance, that defendants in error had assigned and disposed of their property with the intent to defraud their creditors, and that they were about to convert the remainder of their property into money with the intent to defraud their creditors. Defendants in error moved to discharge these orders upon the ground that the facts stated in the affidavits were insufficient in law to authorize the issuance of the orders, and that the facts stated in the affidavit were untrue. The ruling of the court was evidently based upon the latter ground. The facts, as shown by the proofs submitted to the lower court, were, that defendants in error were merchants in Falls City, carrying a stock of goods of the value of from \$14,000 to \$18,000, and that they were indebted to various persons and firms to the amount of about \$11,000. That certain of the creditors who resided in the city of Chicago, and representing about \$9,000 of the indebtedness, were pressing defendants in error for payment or security, when they executed and delivered to them a chattel mortgage on their stock of goods, and under which the mortgagees took possession. The attachments followed.

The fraudulent intent which it is claimed existed at the

time of the execution of the mortgage is not proved by any direct testimony, but it is claimed that the circumstances surrounding the transaction clearly indicate such intent. These circumstances consist in part in the facts that the goods were not removed from the store; that one of defendants in error remained in the store, apparently in charge, or at least partially so; that defendants in error refused to secure the debts due plaintiffs in error either by turning over to them a part of the goods or by the execution of mortgages subject to that held by the Chicago creditors; and by the fact that goods were purchased of plaintiffs in error a short time before the execution of the mortgage, and that the property mortgaged exceeds in value the amount of the debts secured.

Upon the other hand this intent is denied, and the positive denial under oath of defendants in error, as well as of the agent of the creditors who procured the mortgage, the fact that the debts secured were *bona fide* debts, that the property was put into the hands of the mortgagees, who took possession and control of them, placing the agent in charge as cashier, and hiring one of defendants in error as clerk at the agreed wages of \$15 per week, are relied upon to repel any presumption of fraudulent intent which might be relied upon by plaintiffs in error. These questions were submitted to the district judge upon the hearing, and in view of the fact that the burden of proof rested upon plaintiffs in error, the intent having been denied, we cannot say the decision was wrong.

It is claimed that when defendants in error executed the chattel mortgage to the creditors named therein, it was done in contemplation of their insolvency, and with the full intention by them to make a final disposition of all their property, quit business, and dissolve the partnership, and that therefore the mortgage was equivalent to an assignment by which certain creditors were preferred, and

was therefore void in law. Much is said in support of this theory. We grant that were the legal effect of the mortgage as claimed, then the position assumed by the plaintiffs in error would be unassailable, for the assignment law of this state—chap. 6, Comp. Stats., 1885, § 29—specifically declares that such assignments shall be void. But we cannot see that the legal effects claimed by plaintiffs in error necessarily follow. It has been repeatedly held by this court, and is the settled law of this state, until changed by legislative enactment, that a debtor in failing circumstances has the right to prefer *bona fide* creditors, and may secure such to the exclusion of others. *Nelson v. Garey*, 15 Neb., 531. *Bierbower v. Polk*, 17 Id., 268. But it is said that the decisions of this state were made before the present assignment law took effect, or rather, the events out of which the actions arose occurred before that time and under the assignment law of 1877. This is true, but the fact remains that these holdings did not depend upon the assignment law of 1877. See Bump on Fraudulent Conveyances, 183, *et seq.* Wait on Fraudulent Conveyances, § 390, *et seq.* Kerr on Fraud and Mistake, 212. This rule has never been changed in this state by legislative enactment, and we know of no reason why it should. It is true that an *assignment* of property for the benefit of creditors must, under section 29, *supra*, be without preferences. But where no assignment is made the rule does not apply. Neither can it be maintained that the mortgage executed by defendants in error is an assignment as claimed by plaintiffs in error. There was no attempt to make an assignment. It was a transfer of property to secure specific debts. The effect of the preference may be to delay other creditors, but if the motive is to secure or pay the preferred debt, it being *bona fide*, the transaction is not fraudulent.

Plaintiffs in error also contend that the value of the mortgaged property being greater than the debt secured, is an indication of fraud, or at least works a fraud upon

them. The extent of the discrepancy between this value and the amount of the debt secured, was a question of fact upon which the judgment of the lower court was taken. The debts amounted to \$9,051, and the court might have found from the testimony that the value of the goods was \$14,390. If he did so find, we cannot hold that this would be in law such a fraud upon the rights of plaintiffs in error as would render the transfer invalid. If it became necessary to foreclose the mortgage and sell the property at forced sale, the residue might not, and probably would not, be great after paying the debt and the necessary expense of the foreclosure.

In the ruling of the court upon this part of the case we see no error.

It is next contended that defendants in error have no standing in court which will permit them to question the attachments. That according to their own theory they were not in possession of the goods at the time of the levy and are not entitled to the possession of them. This might, perhaps, be sufficiently answered by saying that since plaintiffs in error have levied upon the property as the property of defendants in error, and insist that it does belong to them, they might not be heard now to say that plaintiffs in error have no such interest in it as would permit them to defend against the attachment. But, however that may be, it is plain that under the provisions of section 235, *et seq.*, of the civil code, the defendant in an attachment proceeding may, at any time before judgment, move to discharge an attachment which has been issued against him and is levied upon property in which he claims an interest. While in this case defendants in error were not entitled to the possession of the property levied on, yet they clearly had an interest in it, subject to the mortgage, which they had the right to protect. The cases cited by plaintiffs in error upon this point are not in conflict with this view.

The order of the district court discharging the attachment is affirmed.

JUDGMENT ACCORDINGLY.

The other judges concur.

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**ALBERT E. FINCH, PLAINTIFF IN ERROR, v. THE COUNTY OF YORK, DEFENDANT IN ERROR.**

1. **Taxes:** MONEY LOANED BY NON-RESIDENT. Plaintiff, a resident of the state of New York, came to Nebraska in April, 1880, remaining until July of that year. While here he loaned a large sum of money, taking notes and mortgages therefor. He then appointed an agent in this state to take charge of the business, collect the money as it matured, and reloan it, with full power to control it, reporting to plaintiff from time to time as the business progressed. In the year 1881, the property was assessed and taxed in the hands of his agent. *Held*, That it was properly taxed in this state.
2. ———: ———. Where personal property, such as notes and mortgages, belonging to a non-resident is placed in the hands of an agent in this state for the purpose of collecting and reloaning the money, using and controlling it without any special directions from his principal, the maxim that "movable things follow the person," does not apply. The *situs* of the property, for the purposes of taxation, becomes fixed in this state, and under the provisions of the revenue law, is taxable here.

ERROR to the district court for York county. The action was brought by plaintiff to recover taxes for 1881 paid by him under protest. Judgment below before NORVAL, J., dismissing the action.

*France & Harlan*, for plaintiff in error, cited: *Cooley Taxation*, 14-16. *Hoyt v. Commissioners*, 23 N. Y., 224. *Lyman v. Fiske*, 17 Pick., 234. *Story Conf. Laws*, 39, 42, 46.

*Scott & Gilbert*, for defendant in error, cited: *Jones v. Seward County*, 10 Neb., 154. *Goldgart v. People*, 106 Ill., 27. *People v. Gardner*, 51 Barb., 352. *Wilcox v. Ellis*, 14 Kan., 601. *People v. Trustees*, 48 N. Y., 390.

REESE, J.

For the purpose of this decision it may be conceded that the plaintiff in error was a citizen of the state of New York until the 4th day of July, 1881. In the month of April, 1880, he came into the county of York, in this state, remaining until July of the same year. When he came to York county he brought with him a large sum of money, and while there loaned it to citizens of York county, taking notes and mortgages therefor to secure the payment of the same. In the month of May he returned to New York, but left his notes and mortgages, and all his interests connected with the money brought by him to this state, in the hands of agents in York, giving them authority to collect in the money as it became due, and to reloan it on mortgage security, and, as stated in the stipulation of facts on which the case was tried in the district court, "in fact transact for him a regular loan business, and report from time to time" to the plaintiff. In the month of July, 1881, he determined to make York county his future home, and did so. Neither the money, notes, or mortgages were at any time withdrawn from York county. The notes and mortgages in the sum of \$3,700.00 were assessed by the assessor of York precinct in the year 1881. The same property was assessed and taxed in the state of New York for the same year, and the taxes paid by him. The question here presented is, was the property taxable in York county?

The power of the state to tax all property within its own limits must be conceded. For the purposes of taxation and the collection of revenue the state possesses all

the attributes of sovereignty, and its power to tax property within its borders is ample and unlimited. But that power is limited to the persons and property within its jurisdiction. Ordinarily the *situs* of moneys and credits follow the domicile of the owner, and if he lives in one state, and has money owing to him from citizens or residents of another state, the state of his residence, only, has the power to tax such credits. And it has been held that where the credits were represented by notes and mortgages, and such notes and mortgages were not in his immediate possession, but were deposited in the state where the debtor resided for payment or collection, yet they were not taxable there for the reason that the notes and mortgages are not the debt itself, but the evidence of it, and the debt followed the owner. *People v. Eastman*, 25 Cal., 603. *Appeal Tax Ct. v. Patterson*, 50 Md., 368. *Latrobe v. Baltimore*, 19 Md., 13. The tax is not on the money, the land on which the security is taken, nor upon the paper upon which the promise and security are written, but upon the *choses in action*, or right to collect the debt. *State v Earl*, 1 Nev., 394. *Desty on Taxation*, 330. *Cooley on Taxation*, 43.

But the power of the legislature to separate, for purposes of taxation, the *situs* of personal property, whether of a tangible nature, or in the form of choses in action, from the domicile of the owner is unquestioned, and if such property, in any form, is within its jurisdiction it may tax it. *Swallow v. Thomas*, 15 Kan., 68. *Tappan v. Bank*, 19 Wall., 490. *Griffith v. Carter*, 8 Kan., 565.

Our attention is directed to section one of article nine of the constitution of this state, entitled "Revenue and Finance," with the suggestion that the section in itself does not provide for taxing the money or credits of non-residents, and that a fair construction would limit the power of the legislature to the taxation only of citizens of the state, and especially the money, mortgages, and notes of residents



only. The essential elements of this provision are that the legislature shall provide such revenue as may be needful by levying a tax by valuation, so that every person shall pay a tax in proportion to the value of his property. As we read it, no words of limitation, so far as residence is concerned, can be found; and as the constitution is generally understood to be a limitation of the powers of the legislature and the people, and not a grant, we conclude the powers of the legislature upon this question are untrammelled. We then look to the statute. Section one of chapter 77 of the Compiled Statutes of 1885, being the chapter on revenue, is as follows: "The property named in this section shall be assessed and taxed, except so much thereof as may be in this chapter exempted. *First.* All real and personal property in this state. *Second.* All moneys, credits, bonds, or stocks, and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property *in transitu* to or from this state, used, held, owned, or controlled by persons residing in this state. *Third.* The shares of capital stock of banks and banking companies doing business in this state. *Fourth.* The capital stock of companies and associations incorporated under the laws of this state."

Referring to the first clause of the above enumeration we find the language broad and comprehensive. *All* real and personal property *in this state* (exemptions excluded). If personal property is *in the state*, that is, has its *situs* here, so as to come under the jurisdiction of the state, it "shall be assessed and taxed." Unless this provision is limited by what follows in the second clause it would seem that our inquiry in that behalf might go no further. But does the second clause place a limitation on the first so far as moneys, credits, etc., are concerned, limiting it to persons "residing in this state?" We think it does to the extent that such property must be either "*used, held, owned, or controlled*" by residents. It may be either. But

REESE, J.

These cases being argued and submitted together and presenting the same questions will be disposed of in the same way. The questions presented by the brief of plaintiffs in error will be noticed in the order in which they there occur therein.

Certain attachments were issued from the district court of Richardson county in actions brought by plaintiffs in error, which were, upon motion of defendants in error, discharged by the order of the judge of the first judicial district. This ruling of the district judge is assigned as error, and is brought to this court for review. The affidavits upon which the attachments were issued allege and charge, in substance, that defendants in error had assigned and disposed of their property with the intent to defraud their creditors, and that they were about to convert the remainder of their property into money with the intent to defraud their creditors. Defendants in error moved to discharge these orders upon the ground that the facts stated in the affidavits were insufficient in law to authorize the issuance of the orders, and that the facts stated in the affidavit were untrue. The ruling of the court was evidently based upon the latter ground. The facts, as shown by the proofs submitted to the lower court, were, that defendants in error were merchants in Falls City, carrying a stock of goods of the value of from \$14,000 to \$18,000, and that they were indebted to various persons and firms to the amount of about \$11,000. That certain of the creditors who resided in the city of Chicago, and representing about \$9,000 of the indebtedness, were pressing defendants in error for payment or security, when they executed and delivered to them a chattel mortgage on their stock of goods, and under which the mortgagees took possession. The attachments followed.

The fraudulent intent which it is claimed existed at the

time of the execution of the mortgage is not proved by any direct testimony, but it is claimed that the circumstances surrounding the transaction clearly indicate such intent. These circumstances consist in part in the facts that the goods were not removed from the store; that one of defendants in error remained in the store, apparently in charge, or at least partially so; that defendants in error refused to secure the debts due plaintiffs in error either by turning over to them a part of the goods or by the execution of mortgages subject to that held by the Chicago creditors; and by the fact that goods were purchased of plaintiffs in error a short time before the execution of the mortgage, and that the property mortgaged exceeds in value the amount of the debts secured.

Upon the other hand this intent is denied, and the positive denial under oath of defendants in error, as well as of the agent of the creditors who procured the mortgage, the fact that the debts secured were *bona fide* debts, that the property was put into the hands of the mortgagees, who took possession and control of them, placing the agent in charge as cashier, and hiring one of defendants in error as clerk at the agreed wages of \$15 per week, are relied upon to repel any presumption of fraudulent intent which might be relied upon by plaintiffs in error. These questions were submitted to the district judge upon the hearing, and in view of the fact that the burden of proof rested upon plaintiffs in error, the intent having been denied, we cannot say the decision was wrong.

It is claimed that when defendants in error executed the chattel mortgage to the creditors named therein, it was done in contemplation of their insolvency, and with the full intention by them to make a final disposition of all their property, quit business, and dissolve the partnership, and that therefore the mortgage was equivalent to an assignment by which certain creditors were preferred, and

of judicial authority seems to be, that for the purposes of taxation the maxim does not fully apply, even where the property is intangible."

*The Supervisors v. Davenport*, 40 Ills., 197, was a case similar to the one at bar in many respects. Defendant had a temporary residence at Pekin, Illinois, and transacted business for his father, Ira Davenport, Charles Davenport, and Martin Adsit, residents of New York, as their agent, loaning money, etc. The statute of that state (Illinois) provided that "all property, real or personal, in this state, all moneys, credits, investments in bonds, of persons residing in this state, or used or controlled by persons residing in this state, shall be entered on the list of taxable property," etc. The property, not only of defendant, but of Ira Davenport, Charles Davenport, and Martin Adsit, was held taxable in Illinois, the court saying that, according to the holding in *Hoyt v. Commissioners*, 23 N. Y., 224, the property was not taxable in New York.

The leading case upon this question is *Catlin v. Hull*, 21 Vt., 152. Hammond resided in New York, and inherited from his father—a resident of Vermont—certain property, consisting of debts due from solvent debtors in Vermont, evidenced by promissory notes. He appointed the plaintiff (Catlin), a resident of Vermont, his agent to control and manage the property and collect and reloan from time to time as he should think proper, and allowed the plaintiff a specific salary for so doing. It was held that the property was properly listed to the plaintiff as "agent" of Hammond, and that it was taxable in Vermont. See also *Redmond v. Commissioners, etc.*, 87 North Carolina, 122, in which it was held that personal property of a non-resident (notes secured by mortgages on land) held by his agent in the state was subject to tax there, and that in such case the actual *situs* and control of the property was there, though the owner resided in another state. Also *The City of Albany v. Meekin*, 3 Ind., 481. *Foreman v. Byrnes*, 68 Ind., 247.

The ruling in *Hoyt v. Commissioners of Taxes, supra*, is peculiarly applicable to this case, because the statute upon which it is founded is very similar to the law of this state, and for the further reason that it is declarative of the law of the state of New York, where plaintiff paid taxes upon the property listed to him here; and by that decision, which was against the power of the state to tax one of its citizens upon capital invested in another state, it is clearly established that the payment was a voluntary one, and for which the state of New York had no claim. See also *People v. Gardner*, 51 Barb., 352. *Battle v. Mobile*, 9 Ala., 234.

By the foregoing it will be seen that a distinction must be maintained between cases of the kind at bar and that class of cases where the property taxed is not in the hands of an agent, and has no *situs* apart from the residence of the owner. Thus in *Hunter v Supervisors*, 33 Iowa, 376, it was held that a resident of that state who had deposited for safe keeping in Illinois promissory notes which he had never brought with him to Iowa, was subject to taxation in Iowa, but the court held that a different rule would prevail if he had conferred authority upon some one as his agent to loan, manage, receive, and collect the same for him, citing *The People v. Gardner, supra*.

We therefore hold that the property was rightfully assessed and taxed in this state, and that the taxes cannot be recovered back.

The decision of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	58
20	206

19	58
33	537

19	58
52	91

GEORGE A. BALLARD, APPELLEE, V. PRENTISS D.  
CHENEY, APPELLANT.

1. **Practice in Supreme Court:** PRINTED ABSTRACT OF RECORD. The act of 1885 requiring abstracts of causes in the supreme court to be made, requires such abstract to be so made as to set forth so much of the case "as is necessary to a full understanding of all questions presented to the court for decision," and so far as the examination of the case by the court is concerned is to take the place of the transcript and bill of exceptions. The court does not look beyond the abstract. All parts of the cause omitted therefrom are treated as not in the case.
2. **Specific Performance.** In 1879 certain real estate was sold on time, the notes for the installments of the purchase price given by the purchaser were made payable at a particular bank. The contract declared time to be an essential element, and on the failure of the purchaser to perform, a forfeiture should ensue. One of the requirements of the contract was that the purchaser should not allow the land to be sold for taxes. The notes for the installment due in October, 1882, were never sent to or left at the bank where payment was to be made. The vendor was a non-resident of the state. The money to pay the installment was not left at the place of payment until in March, 1883. On the 8th day of October, 1882, the vendor purchased the land at tax sale, but redemption was soon after made by the purchaser. The notes due in 1883 were never sent to or left with the bank at which payment was to be made, but the money was left there for their payment before their maturity. On the 16th day of June, 1884, the vendor never having sent any of the notes to the place of payment, and having declined to receive the money left there for him, and after valuable improvements had been made on the land, offered to return the unpaid notes, and declared the contract forfeited. *Held*, That the purchaser was not in default and was entitled to the performance of the contract.
3. **Payment:** PLACE OF PAYMENT. When a bank is designated as the place at which a purchase-money note is to be paid, the maker is not in default in not paying the same until the note is received at the bank. *Robinson v. Cheney*, 17 Neb., 673.

APPEAL from Johnson county district court. Heard below before BROADY, J.

*L. W. Colby and Everest & Waggener, for appellant.*

*T. Appelget & Son, for appellee.*

REESE, J.

This cause is submitted upon an imperfect abstract of the record. In many respects it is simply a brief digest or index of the transcript and bill of exceptions. The appellee, following the course of the appellant, makes his principal references to the record, ignoring in many essential parts of the case the abstract.

Counsel on both sides seem to have lost sight of the purpose of the law requiring abstracts, and depend upon the court to spend the time which is not at its disposal in reading the whole record of the case. The object of the legislature in passing the law of 1885 (Laws 1885, Ch. 95, § 586, Civil Code), as plainly expressed in the act, was to require the abstract to set forth so much of the record "as is necessary to a full understanding of all questions presented to the court for decision," in order that the questions might be so presented as to enable the court to pass intelligently upon such as demand attention, and yet not be required to devote its time in reading or examining the voluminous records made in the trial of the cause, thus enabling the court to dispose of the large and rapidly increasing business demanding attention. It is not contemplated that the transcripts or bills of exceptions shall be looked into for any purpose, except in cases where conflicting abstracts are presented, in which event the transcript and bill of exceptions will be examined only so far as may be required to settle disputed questions thereon, and ascertain to whom the additional costs shall be taxed. In all cases when the parties can agree upon an abstract as fairly presenting the case no transcript or bill of exceptions is necessary, and much of the expense of the preparation of causes

for review may be obviated. The act above referred to, and which may be found at page 875 of the session laws of 1885, conferred upon the court the authority to prescribe and publish such rules of practice and forms as may be necessary to carry out the provisions of the law. This duty has been performed, and the rules and forms have been published and are also embodied in the bar docket of the present term of court. Especial attention is called to rules eight to fifteen inclusive. By an observance of the statute and these rules of court all confusion and uncertainty in the presentation of causes may be avoided, and the rights of litigants protected.

These observations are not made for the purpose of reflecting in any manner upon the able counsel presenting this case, for we find that the bar throughout the state have, in many instances, fallen into the same erroneous opinions concerning the object of the law, but for the purpose of calling the attention of attorneys to the requirements of the law upon this subject.

The action in this case is one for the specific performance of a contract for the sale of real estate, and is in almost all respects similar to *Robinson v. Cheney*, 17 Neb, 673. In that case the plaintiff, Robinson, prior to his purchase, held under a lease. Such does not appear to have been the case here. The contracts of sale are substantially the same, and what is said in that case in the opinion written by the present chief justice, MAXWELL, in reference to the construction of that contract need not be repeated here, as we fully approve all that is there said upon that branch of the case. The contract, therefore, was a contract of sale and not of lease.

It is insisted that since the time in which the several installments of the purchase money was to be paid was made the essence of the contract, and that by its terms an installment of about \$74.00, due the 22d day of October, 1882, was not paid nor offered until in March, 1883, and



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Ballard v. Cheney.

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the allowance of the land to be sold for taxes in 1882 was gross negligence on the part of plaintiff, and that he thereby forfeited all rights under the contract. As in *Robinson v. Cheney, supra*, the notes for the unpaid part of the purchase price were all made payable at the office of Russell & Holmes, at Tecumseh. And, as in that case, they were not sent there for payment to be made. It follows, therefore, that, as held in that case (p. 680), "until the notes were sent to Russell & Holmes the plaintiff was not required to pay the same, and the failure to so send them is a waiver of the condition." There was then no default in the payment of the installment spoken of which would work a forfeiture of the contract. Subsequent installments were left at the office of Russell & Holmes before they became due. As to the payment of the taxes, the abstract leaves us in some doubt as to when they were paid. Plaintiff testified that he paid the taxes on the land for the years 1880, 1882, and 1883, and produced the receipts therefor; also a certificate of redemption for 1881. Defendant testified that he bought the land for the tax of 1881, for \$12.58. It may therefore be presumed that the certificate of redemption referred to in the testimony of plaintiff for the taxes of 1881 was the redemption from the purchase of defendant. This purchase was made on the 8th day of November, 1882, by defendant. As the sale of real estate for delinquent taxes began by law on the first Monday of that month, it must be that defendant purchased the land at the first opportunity offered. It cannot be supposed that at that time he considered the contract forfeited and the land his, or he would not have purchased it for taxes. Neither can we suppose that he presumed he could thus, by an act of his own, work a forfeiture of the rights of plaintiff. It is true that at that time the installment due October 22d, 1882, had not been paid, but it is equally true that he had waived any right to take advantage of this omission by failing to have the notes at the place of payment. It is somewhat

strange that he should have the notes drawn payable at the office of Russell & Holmes, and then fail to send any of them there for payment. Being a non-resident of the state it would seem quite reasonable that a place of payment should be designated in the notes, but quite unreasonable that the notes should not be at the place of payment if it was his purpose to insist upon a strict compliance with his contract, *unless* his design was to induce plaintiff to believe the condition was waived, and thereby induce him to fail in some requirement of the contract, in order that the forfeiture might be declared, and the property, with the improvements of the value of \$450.00 and the purchase money already paid, wrested from the plaintiff. This latter supposition cannot be adopted for the reason that such a course would be so essentially dishonest as to repel the idea. Furthermore it is shown that the notes for the remainder of the purchase price were not returned to plaintiff until the 16th day of June, 1884, long after the fourth installment was due and the money deposited with Russell & Holmes to pay it, and eighteen months, perhaps, after the redemption from the tax sale, and of all of which the defendant had, or might have had if he so desired, full notice. It may also be said that at the time the defendant sought to rescind the contract plaintiff was not in default in any particular. His previous failures, brought about perhaps by the failure of defendant to comply with the implied contract upon his part, had all been corrected by full payments. Again, it is shown that during the time intervening between the maturity of the notes in October, 1882, and the 16th day of June, 1884, the improvements spoken of were being made upon the land, and of which defendant doubtless had knowledge, and which, by his silence, were encouraged, and which would naturally tend to make plaintiff rely upon the security of his investment.

It is clear that by the conduct of defendant he waived the strict compliance with the conditions of the contract as

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Ahlman v. Meyer & Schurman.

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now contended for, and that the question of the forfeiture by plaintiff of the contract, by any failure on his part to comply with its terms, does not arise, and that the decree of the district court is correct. It is affirmed.

DECREE AFFIRMED.

THE other judges concur.

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HERMAN AHLMAN, PLAINTIFF IN ERROR, V. MEYER &  
SCHURMAN, DEFENDANTS IN ERROR.

1. **Replevin: NON-SUIT IMPROPER.** In an action of replevin the trial court should in no case grant a non-suit, but in case of the plaintiffs failing to prove his cause of action the court should retain the cause for the purpose of taking the proper proofs and rendering the appropriate judgment.
2. **Instructions to the jury examined, and Held,** Rightly given and refused.

ERROR to the district court of Pierce county. Tried below before TIFFANY, J.

*Brome & Durland*, for plaintiff in error.

*W. L. Henderson, Fred. J. Fox, and E. F. Gray*, for defendants in error.

COBB, J.

It appears that on the 11th day of June, 1883, one Henry Poggensee was engaged in mercantile business at Plainview, Pierce county, and was indebted to sundry persons and firms. Among them, and doubtless his largest creditor, was the firm of Meyer & Schurman, the defendants in error. On that day the said Poggensee executed and delivered to Meyer & Schurman a chattel mortgage,

19	63
47	704
48	603
19	63
52	631
19	63
56	200
56	744

in and by which he granted to them his entire stock of merchandise to secure his indebtedness to them, amounting to seven hundred and forty-eight dollars and seventy-five cents. The mortgage is in the usual form, and authorizes the mortgagees in case the note therein described as falling due June 11th, 1883, is not paid at maturity or in case of the mortgagor attempting to dispose of or remove any of said goods from the county of Pierce, or if at any time the said mortgagees should feel unsafe or insecure, then and in that case to take immediate possession of said goods and chattels and sell the same, etc. It also appears that on the same day the mortgagees caused the said mortgage to be recorded, and applied to the mortgagor and demanded and took possession of the said goods and proceeded to invoice them. It further appears that on the 26th day of the same month the defendant in error, who was sheriff of Pierce county, seized and took the said goods from the possession of the mortgagees by virtue of an order of attachment then in his hands against the property of Henry Poggensee and in favor of Jandt & Tomkins.

The said Meyer & Schurman then brought their action in replevin in the district court of Pierce county against the said sheriff and replevied the said goods. The said sheriff defendant appeared and plead to said action, a trial was had to a jury, which found a verdict for the plaintiffs for the possession of the goods, and damages to the amount of ten dollars. A motion for a new trial being overruled and judgment rendered for the plaintiffs, defendant brings the cause to this court on error.

Plaintiff in error assigns for error the overruling by the court of the motion of the defendant for a non-suit; the giving of paragraphs Nos. 5, 6, and 7 of instructions given by the court on its own motion; the giving of paragraph No. 1 of instructions given by the court at the request of the plaintiffs; and the refusal to give paragraph No. 1 of the instructions prayed by the defendant.

As to the first point, in an action of replevin both parties are said to be actors and equally interested in the court's maintaining jurisdiction of the case and disposing of it on its merits. I know of no case which would justify a court in granting a non-suit in an action of replevin.

The instructions, the giving of which is assigned as error, are as follows:

"5. You are instructed that if you find from the evidence that at the time of the levy of the attachment the plaintiffs were in possession of the property by virtue of the mortgage in evidence, that would be *prima facie* evidence of ownership, and would entitle them to a verdict unless the defendant has shown by a preponderance of evidence that the mortgage was fraudulent and void.

"6. The real question for you to determine is, whether or not the mortgage was made in fraud, if it was then your verdict should be for the defendant. If not, you should find for the plaintiffs. And this is a question of fact for you to decide from the evidence, consisting of all the facts and circumstances shown to have surrounded the parties at the time of the making of the mortgage and the taking possession thereunder.

"7. You are instructed that a chattel mortgage containing a condition that the mortgagor shall remain in possession thereof and continue to sell the same in the ordinary course of business is void as to other purchasers in good faith and subsequent creditors of the mortgagor. But when the mortgage contains no such conditions the presumption of good faith attaches when the mortgagee is in possession, and the burden of proving fraud is upon him who alleges it."

"1. (Given at the request of plaintiffs). The court instructs the jury that in this case the burden of proving property, so far as the right of property is concerned, is upon the plaintiff, and if possession of the property has been shown by the evidence to have been with the plain-

tiffs at the time it is alleged to have been levied upon by the defendant, then such possession is *prima facie* of title to the said plaintiffs.

"2. The court further instructs the jury that fraud is never presumed, but must be clearly proven to entitle a party to relief on the ground that it has been fraudulent, and the presumption of law is, that business transactions of every man are done in good faith, and for an honest purpose, and any one who alleges that such acts are done in bad faith or for a dishonest purpose takes upon himself the burden of showing by specific acts and circumstances, tending to prove fraud, that such acts were done in bad faith."

The following instruction was prayed by the defendant, but refused by the court:

"If you find from the evidence that the chattel mortgage given Meyer & Schurman by Henry Poggensee, and introduced in evidence in this case, was given with the understanding that Poggensee was to remain in possession of the goods in controversy, and continue to sell the same in the usual course of trade, then, under the law, said mortgage was void, and conveyed no title to plaintiffs, and your verdict will be for the defendant."

The chattel mortgage having been placed in evidence, shows for itself. It is in the usual and approved form and contains no provision for the mortgagor going on and selling the mortgaged property in the course of trade, or otherwise, but on the contrary contains a stipulation against the disposal of the whole or any part thereof. From the deposition of Mr. Poggensee it appears that he "gave the mortgage upon the agreement that they," Meyer & Schurman, would not bother him or trouble him, but to allow him to sell right along, and pay up as fast as he could. But that as soon as they got the mortgage, and got it recorded, they demanded possession of the goods; that after some hesitation and objection on his part, he gave them up.

This deposition of Henry Poggensee was taken upon notice in the state of Iowa. No counsel appeared for either party at the taking, nor were interrogatories submitted to the witness. His attention seems to have been chiefly directed to a justification of his own conduct, and excusing himself for not having kept faith with a creditor who held an unrecorded mortgage against him, as well as to throw the blame of his failure upon other parties. He does not say, although possibly that inference might be drawn from his language, that the agent of Meyer & Schurman made any agreement with him other than that expressed in the mortgage. He may have meant by his statement in his deposition to give his construction of the language of the mortgage, the only agreement beside that expressed in his note which he is anywhere shown to have entered into with Meyer & Schurman. If anything else, he must have intended to refer to such discussion as was probably carried on between him and the agent before his agreement to give the mortgage, and which he may have supposed was expressed in its terms. If there was an agreement between Poggensee on the one part, and Meyer & Schurman on the other part, entered into through their agent, or otherwise, other than that expressed on the face of the chattel mortgage, and it is sought to attack said mortgage through such agreement, its terms must have been presented to the court and jury on the trial to be made available either there or here. This, even if it be conceded, which I think altogether doubtful, that a chattel mortgage can be attacked collaterally through an agreement of whatever character between the mortgagor and mortgagee, prior to or contemporaneous with the execution of the mortgage.

Again, in the case of *Gregory v. Whedon*, 8 Neb., 373, it was held that "a chattel mortgage of a stock of goods in a store, with power to the mortgagor to sell in the ordinary course of trade, although fraudulent and void as to creditors and subsequent purchasers in good faith, is valid

between the parties to it." To apply that law to the case at bar. If it be conceded that in consequence of the agreement indefinitely referred to by Mr. Poggensee in his deposition, the chattel mortgage was void, or, as I think, more properly speaking, voidable, as between Poggensee and his creditors, though its execution constituted ground for attachment against him, yet as between him and Meyer & Schurman it was good. It thus being good they enforced it against him, and by virtue of it took the actual possession of the property. It being a good chattel mortgage between the parties, the title to the property passed to the mortgagee upon its execution and delivery. Now then, when the lawful possession of the property also passed to them and became associated in the same person with the right of property, did anything remain in Poggensee to be reached by his creditors? I think not.

*Prima facie* Meyer & Schurman do not have to rely upon their chattel mortgage to defend this action, but upon their possession, lawfully acquired. And if it becomes necessary to take a step further, they can show a deed (chattel mortgage) of the title, unincumbered by the claim of any other person.

These considerations lead me to the conclusion that the instructions were properly given and refused.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.



GRAY, BURT & KINGMAN, PLAINTIFFS IN ERROR, V. V.  
E. FARMER, DEFENDANT IN ERROR.

1. Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law it is sufficient. *The S. C. & P. R. R. Co. v. Finlayson*, 16 Neb., 578.
2. The Verdict, *Held*, Unsustained by the evidence.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. C. Platt and Harwood & Ames, for plaintiffs in error, cited: *Milton v. State*, 6 Neb., 144. *Mutual Hail Ins. Co. v. Wilde*, 8 Neb., 427. *Holland v. Griffith*, 13 Neb., 475. *Shapleigh & Co. v. Dutcher*, 15 Neb., 564.

Lamb, Ricketts & Wilson, for defendant in error, cited: *St. Louis v. State*, 8 Neb., 405. *Parrish v. State*, 14 Neb., 61. *Murphy v. State*, 15 Neb., 383. *S. C. & P. R. R. v. Finlayson*, 16 Neb., 578.

COBB, J.

On the first trial of this cause in the district court there was a verdict and judgment for the plaintiffs. The judgment was reversed on error in this court. The case is reported in 16 Neb., 401. Upon the second trial there was a verdict and judgment for the defendant. The plaintiffs now bring the cause to this court on error.

Two principal errors are assigned:

1. As to the instructions. With other instructions prayed by the plaintiffs and given by the court, the following was also given: "8. If the goods in controversy actually arrived in Lincoln over a different line of road than that over which defendant ordered them sent (if he did so order), and the defendant, with full knowledge of

19	69
27	684
19	69
40	135
19	69
42	137
43	410

the condition of the said goods, accepted the rice (being one of the items of goods in said plaintiff's bill mentioned) after its arrival in Lincoln over the same road as the other goods, though at a later date, then the jury are instructed that the defendant waived the shipping instructions he gave (if any), and could not refuse to take the balance of the goods ordered at the same time as said item of rice (on the ground that the plaintiff had violated shipping instructions), even if said goods were damaged in transit, provided that the jury further find that said goods were delivered according to sample, in good, marketable condition to such railway company in Chicago."

Plaintiffs in error claim that, after having given the above instruction, it was error on the part of the court to give the following, numbered 2 and 3, which were prayed by the defendant and given by the court: "2. You are instructed that if you find from the evidence that the defendant, at any time previous to the shipment of the goods sued for, gave plaintiff's agent, Whaley, orders to ship all goods ordered by the defendant of the plaintiffs over the Chicago, Burlington & Quincy railroad, and that such directions were not afterwards countermanded or waived, then it would be immaterial whether defendant directed this particular shipment to be made over that road, and if you find from the evidence that such directions were given by defendant, and disregarded by the plaintiffs, you will find for the defendant. 3. The plaintiffs seek to recover for goods sold and delivered to the defendant, and you are instructed that if the defendant directed plaintiffs to ship all goods ordered by him of them over the Chicago, Burlington & Quincy railroad, and the plaintiffs shipped the goods sued for over the Chicago, Rock Island & Pacific railroad, and if you further find that they were injured in transit, then defendant was under no obligation to take them, and you will find for the defendant, unless such instructions or orders had or have been waived by defendant."

I cannot say that there is any inconsistency or discrepancy in these instructions. In number 8 the court tells the jury that the acceptance by the defendant of the rice, knowing the condition of the other goods, amounted to a waiver on his part of the order previously given by him (if such order was given) to have the goods shipped over the C. B. & Q. railroad; and in numbers 2 and 3 it tells them that if they find that such order had been given, had been disobeyed by the plaintiffs, and the goods shipped by another route, and that order had neither been countermanded nor waived by defendant, and the goods were injured in transit, that then defendant was under no obligation to take them, etc. This court has held, in the cases cited by counsel for defendant in error, to the effect that all the instructions given the jury must be construed together; and if when considered as a whole they properly state the law, it is sufficient. Following this rule, I think that the instructions complained of by counsel for plaintiffs in error, although, if considered alone, might be deemed objectionable, yet, when considered in connection with and viewed by the light of instruction No. 8, they are free from objection.

2. Is the verdict of the jury sustained by the evidence? It appears from the evidence that at the date of the trial the defendant was, and had been for the preceding fourteen or fifteen years, engaged in the business of a retail grocer in Lincoln, buying largely at wholesale at Chicago and other markets; that for the period of one year and a half or two years prior to the date of the principal transactions involved in this controversy, say the middle part of the month of June, 1882, defendant was a constant customer of the plaintiffs, making purchases of groceries of them as often, if not oftener, than once in each month. These purchases had generally, if not always, been made by order and sample through one E. E. Whaley, a traveling agent or solicitor of the plaintiffs. It was the custom of

this agent to call on the defendant at his store, at the city of Lincoln, as often as once or twice per month, exhibit to him his samples, and solicit orders from him for bills of goods, to be shipped from Chicago. On some of these occasions defendant would make and deliver to said agent orders for goods, and sometimes he would not. At this time there were at least three principal competing lines of railroad carrying freight between Chicago and Lincoln: The Chicago, Burlington & Quincy railroad, the Chicago, Rock Island & Pacific, in connection with the Union Pacific railroad, and the Chicago & Northwestern, in connection with the Union Pacific railroad. On one or more occasions, at or near the commencement of the dealings between the plaintiffs and defendant as above stated, and upon the occasion of the making and delivery to the said Whaley of one or more of the orders for goods, as above stated, the defendant directed the said Whaley to ship all goods to him by the Chicago, Burlington & Quincy railroad. On the 13th day of June, 1882, the defendant, through the agency of the said Whaley, forwarded to the plaintiffs an order for a bill of goods, as follows:

3 bbls. ex. C Sugar.  
3 " St. D A Sugar.  
3 " " Gran. "  
1 bag 52 Rice.  
3 cases Arb. Coffee.  
6 kits 12, 1, Bay Mkl.  
6 " 12, 1, Med. "  
12 " 12, 1, Wht Fish.  
6 " 12 Fam. "  
1 Bx. 2 Halibut.  
2 " Star 8's candles.  
1 Bbl. Schumacher's Amber Graham.

This order was received by the plaintiffs on or about the fifteenth day of the said month, and the goods therein

called for, all except the bag of rice, were shipped to the defendant by the plaintiffs by and over the Chicago, Rock Island and Pacific railroad, on or about the 16th day of June, 1882. The plaintiffs not having the rice in their store at that time, the same was not shipped until on or about the 21st day of June, when the same was shipped by the same railroad. The goods, except the rice, arrived at Lincoln in the night of June 25, 1882, by the Union Pacific railroad, having been transferred to it by the Chicago, Rock Island and Pacific railroad, at Council Bluffs, the point of junction of the two roads. These goods were inspected by the defendant on the 26th day of June, and found to be in bad order, having passed through the hurricane of the nineteenth day of that month at Grinnell, Iowa. It appears, also, that the bag of rice shipped over the same road on or about the 21st day of the month as above stated arrived at Lincoln, also over the Union Pacific railroad, on the night of the 26th day of June, and was received and accepted by the defendant on the 27th day of June, and was afterwards paid for by him without protest or objection. But defendant refused to receive or to pay for the other goods.

By the eighth instruction, above quoted, the court told the jury, in effect, that if they should find from the evidence that the defendant instructed the plaintiffs to ship the goods over a specified line of railroad, but that they shipped them over another and different line, and the defendant, with full knowledge of the condition of the goods, accepted the rice (being one of the items of goods in said plaintiff's bill mentioned) after its arrival in Lincoln over the same road as the other goods, though at a later date, then they were instructed that the defendant waived the shipping instructions, and could not refuse to take the balance of the goods, on the ground that the plaintiffs had violated shipping instructions, etc.

Accordingly, even without reference to the special find-

ings, it is manifest that in order to reach the verdict for the defendant the jury must have found that the defendant did not receive and accept the bag of rice with knowledge of the condition of the other goods shipped over the same road and embraced in the same order and bill as the rice; but by reference to the special findings it will be seen that by their sixth special finding they say that, "Mr. Farmer, prior to the loss or destruction of the goods in controversy," did not "waive such direction for the shipment of his goods, so given by him."

It is impossible to say to what extent the jury were misled by the submission to them of this special finding as it was submitted. They should have been directed to find the presence or absence of the facts which the court in the general charge had told them would amount to a waiver of the shipping instructions. But, so far as their special finding is concerned, in view of the evidence, it is manifest that they simply differed with the court as to the effect of the acceptance of the rice by the defendant as matter of law.

It is not my purpose to quote the testimony from the bill of exceptions, but will content myself with saying that there is scarcely a conflict of evidence as to the acceptance by the defendant of the bag of rice, without protest or complaint on account of the route by which it had been shipped, with knowledge that all the goods had been shipped over the Chicago, Rock Island & Pacific railroad instead of the Chicago, Burlington & Quincy railroad, and that the goods, other than the rice, had been caught in a severe storm on the line of said first named railroad, and greatly damaged, and of the extent of such damage. It is true that the defendant testified on the trial that he did not think that he knew of the damage to the other goods when he accepted the rice, but he declared that he would have accepted the rice just the same if he had known of the damage to the other goods. The testimony of several other witnesses to the facts as to the time when defendant in-

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Traphagen v. Sheldon.

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spected the damaged goods, when he accepted the rice, and the want of positiveness on the part of defendant to the contrary, should have left no doubts on the minds of the jury on that subject; and the rice was paid for by defendant nearly two months after the inspection by him of the damaged goods. I conclude, therefore, that in so far as the verdict of the jury involved the finding, that defendant did not accept and pay for the rice with knowledge of the damage to the other goods and of the line over which they had all been shipped, it is not sustained by the evidence. As there must be a third trial, I will refrain from animadverting upon the legal effect of the long acquiescence of the defendant in the disregard of his shipping instructions by the plaintiffs before the occasion which he now seeks to take advantage of.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

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WESLEY J. TRAPHAGEN, APPELLEE, v. FRANK L.  
SHELDON ET AL., APPELLANTS.

**Trial: JUDGMENT.** The evidence upon the sole question of fact at issue being contradictory, and nearly equally balanced, the finding and judgment of the trial court upheld.

APPEAL from the district court of Lancaster county.  
Tried below before POUND, J.

*L. C. Burr*, for appellants.

*Webster & Stewart*, for appellee.

COBB, J.

It appears from the abstract that on the 28th day of December, 1880, one Viroqua Doan and husband executed and delivered to the appellee their certain promissory note for \$500, payable three years from that date, with interest at the rate of ten per cent per annum, and to secure the same they, on the same day, executed and delivered to the appellee a mortgage on the 80 acre tract of land therein described; that some time after the above transaction, and before the maturity of said note, B. F. Cobb, one of the appellants, purchased the said tract of land from the said Viroqua Doan, subject to the said mortgage, which he agreed to pay; that on or about the 1st day of May, 1884, the said note being past due and remaining unpaid, the said B. F. Cobb executed and delivered to the said appellee his note for \$2,000, and secured the payment thereof by a mortgage on the said tract of land, with other lands; and that some months afterwards B. F. Cobb sold and conveyed the said land, including the Doan 80, to the appellant, Frank L. Sheldon, to whom he warranted the same against all incumbrances except the \$2,000 mortgage, and assured him that the Doan mortgage though not formally released was merged in the said \$2,000 mortgage, subject to which latter mortgage the appellant Sheldon accepted the conveyance of the said land. This suit was brought to foreclose the said Doan mortgage; and the sole question involved in the trial before the district court was whether the Doan note was provided for and merged in the \$2,000 note and mortgage. This issue the trial court found in favor of the appellee, plaintiff in that court, and rendered a judgment of foreclosure for the amount of the Doan note and interest. There were but two witnesses sworn on the trial, the appellant Cobb for the defendants, and the appellee Traphagen on his own behalf.

The testimony of these witnesses agrees well enough in



most respects; but upon the main point they contradict each other quite squarely. After a thorough examination of the abstract, the writer is in doubt which way he would have decided had he been sitting in the trial court. It is not deemed incumbent on me to present the theories or tables of figures of the respective briefs of counsel, in and by which they each establish the case of their respective clients, no doubt, to their own satisfaction, as no amount of theorizing would justify this court in reversing the finding of a trial court upon equally or nearly equally balanced evidence.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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29	248

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**HENRY BROADWATER, PLAINTIFF IN ERROR, v. SAMUEL JACOBY, DEFENDANT IN ERROR.**

1. **Appeal from Justice of the Peace: TRANSCRIPT.** Where a transcript of a justice's docket shows that the parties were present at a trial, and that the cause was tried, both parties being sworn and examined as witnesses, the fact that the defendant was called as a witness for plaintiff will not deprive him of the right of appeal to the district court.
2. **Answer: GENERAL DENIAL: EVIDENCE.** When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony given by the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary.
3. **Married Women.** The personal property which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or the gift of any person except her husband, or which she shall

acquire by purchase or otherwise, will remain her sole and separate property, notwithstanding her marriage, and will not be subject to the disposal of the husband, but the wife may sell and convey such property and enter into any contract with reference to the same the same as a married man may do with reference to his property. She may dispose of her personal property, and if sold in good faith the title and right to possession will pass to the purchaser free from any claims of the husband.

**APPEAL** from the district court of Lancaster county.

*Foxworthy & Son*, for plaintiff in error.

*L. C. Burr*, for defendant in error.

**REESE, J.**

This cause originated before a justice of the peace, where Broadwater sued Jacoby for the sum of \$100, for the alleged conversion of certain hogs of that value. Judgment being rendered in favor of plaintiff, defendant appealed to the district court. In that court plaintiff moved to dismiss the appeal, for the reason that no defense was made in the court below. This motion was overruled, and the ruling thereon is now assigned for error.

Conceding as law all that is claimed by plaintiff in error, we still think there was no error in the ruling of the court below upon this motion. By reference to the transcript of the docket of the justice of the peace it may be seen that both parties appeared at the time of trial; that a jury was waived and a trial had. The plaintiff took the witness stand in his own behalf, and then placed the defendant on the stand as his witness. It is quite probable, and indeed we must presume the fact to be, that the examination of those witnesses was as to the merits of the case, and that the decision of the justice of the peace was made thereon.

It would be difficult to see for what purpose the defendant would desire to go upon the witness stand a sec-

ond time for the purpose of testifying upon the merits, after having been examined by his adversary and cross-examined by his own counsel, if such were the fact. The presumption would be that the case was pretty well presented. So far as is shown, the trial before the justice of the peace was a full investigation of the merits of the case, from the conclusion of which either party, being dissatisfied, could appeal. *Rawalt v. Brewer*, 16 Neb., 444.

The second question presented is, that the trial court erred "in allowing defendant to introduce any testimony, for the reason that he did not plead any new matter of defense, and erred in overruling plaintiff's motion to strike all the testimony from the record, for the reason that the same had not been properly pleaded." The answer is a general denial of "each and every allegation" contained in the petition. As we understand the rules of pleading and the admission of testimony, a general denial of the allegations of a petition presents an issue, upon which testimony may be introduced by both parties. There can be no doubt of this. The court did not err in overruling the objection to testimony. At the close of the testimony plaintiff's attorney moved to strike out all the "testimony offered and introduced by the defendant in this case, for the reason that they had not set up any defense in their answer, and not having set up any defense in their answer they are not entitled in law to introduce any testimony whatever." To say the least, this objection is far-reaching, and covers the whole ground sought to be occupied by plaintiff in error. But, without elaboration, we must be content by saying that *at least* such testimony as tended to contradict the allegations of the petition, that plaintiff was the owner of the property in dispute, and that defendant had converted it to his own use, and the testimony introduced in support of them, would be competent under a general denial, and therefore the court did not err in its ruling.

The next, and last, contention is, that the court erred in

giving certain instructions asked by defendant. They are as follows:

"1. The jury are instructed that the husband acquires no right in the nature of a lien or title to compensation for his labor upon his wife's separate property, and in the absence of an express agreement to that effect there is no implied obligation on the part of the wife to compensate the husband for his supervision of and labor bestowed upon her separate property.

"2. The jury is further instructed that the ownership of a farm carries with it at law and in equity the right to its products, whether stock or crops raised thereon, and that the labor of the husband for the owner of such farm, though mingling in the production, creates no title to the product, whether the labor be that of a husband or another, in the absence of an agreement to that effect.

"3. The jury is further instructed that all the property which can be shown by the testimony to belong to the separate estate of the wife, whether real, personal, or mixed, and all the rents, issues, profits, and increase thereof, are sacred to the use of the wife, and are not subject to the disposition of the husband, nor liable for his debts.

"4. The jury is further instructed that if you shall find from all the testimony that the hogs here in question were, at the time this suit was brought, the separate property of the wife, or were purchased or raised for her with the profits, proceeds, or products of her separate property, whether real or personal, then your verdict must be for the defendant."

The objection urged to these instructions is, that they fail to allow the husband any compensation for his services rendered in taking care of and managing the property of the wife. A number of authorities are cited in support of the theory that the personal property vested, to some extent at least, in the husband.

It should be here remarked that the property in question

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Thomas v. Thomas.

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in this suit was purchased by the defendant from the wife of plaintiff. Plaintiff insists the hogs were his. The farm upon which the plaintiff and his wife resided was the property of the wife, and this property evidently belonged to the wife. The question of ownership was left to the jury, and they found the title to be in the wife until her sale and delivery to defendant. The instructions, while somewhat fervid and considerably embellished with a display of language, are in essence a statement of the law of this state with regard to the rights of married women (see chapter 53, Compiled Statutes), and being applicable to the case were properly given.

No error appearing of record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOHN D. THOMAS, APPELLANT, v. SYLVIA E. THOMAS,  
APPELLEE.

**Practice in Supreme Court: DECREE OF DIVORCE.** Under the pleadings, the burden of proof being upon the defendant, and the evidence not being sufficient to sustain the verdict in her favor, the decree thereon reversed, the verdict set aside, and a decree for the plaintiff in the supreme court.

APPEAL from Douglas county district court. Heard below before WAKELEY, J.

C. A. Baldwin, for appellant.

No appearance for appellee.

COBB, J.

This action was before this court at the July, 1884, term, and the decree of the district court dismissing the action upon the verdict of the jury in favor of the defendant was reversed, and the cause remanded. See 16 Neb., 533. There was a new trial to a jury, which again found for the defendant. There was a second decree in her favor dismissing the action, and the cause is again brought to this court by appeal.

The following is a synopsis of the pleadings:

“PETITION.

“The plaintiff says that he married the defendant in Omaha, September 1, 1875. That she represented herself to be a single woman.

“That since said marriage he has discovered that she had had, at the time of his said marriage with her, two husbands, and he asks that she be compelled to answer to his petition under oath a large number of interrogatories, to-wit:

“That she state whether or not she had been married previous to her marriage with him.

“That she give the name or names of her former husbands.

“When and where she was married to them.

“What has become of them. If she has been divorced from them?

“State when and where?

“And he prays that the marriage contract existing between them be declared null and void, for the reason at the time of said marriage she had a living husband, from whom she was not divorced.”

**"DEFENDANT'S ANSWER.**

"The defendant admits the marriage to Thomas as alleged.

"And in answer to the interrogatories propounded, says:

"That prior to her marriage with Thomas she had been twice married.

"Her first husband was Orson Nickerson, to whom she was married in 1857.

"That she was divorced from him in 1866.

"Her second husband's name was Samuel Price; was married to him in 1867, in Wisconsin.

"That Price left her in 1868, without saying where he was going, or anything about it, and that from that time to the present she has not seen nor heard from him.

"That he so left her more than seven years prior to her marriage with Thomas.

"And she avers that both Nickerson and Price are dead.

"She says that she was informed that Price committed suicide about one year prior to her marriage with Thomas, but can't tell the source of her information, when or where she received it.

"She also asks for a divorce from Thomas.

"Upon the trial it was agreed that she was divorced from Nickerson, and that he died before her marriage with Price.

"And the defendant also dismissed her cross bill for divorce.

"So that the only issue now involved in the action is, was husband No. 2, Samuel Price, dead at the time these parties married, to-wit: September 1, 1875."

The district court held that the affirmative of the issue was with the defendant.

Upon the trial, defendant introduced evidence as follows:

Being called as a witness in her own behalf, defendant testified—

“That she married plaintiff September 1, 1875.

“That she married Price May 19, 1867, in Wisconsin.

“That Price left her in the following November, remaining away until March, 1868, when he came back and took her from Wisconsin to Iowa City, Iowa, where he stayed until July 8, 1868. Then he packed his satchel and said he was going away to leave me forever. He conveyed certain property to me through a Mr. Baker, on July 9th, 1868, as I afterwards learned from Baker. It was his right to 80 acres of land where we lived. Since which time I had not seen him, nor had any letter or correspondence with him to know whether he was living or dead. At the time of this suit before, a person told me that there was some one that had seen in a newspaper an account of the death of a man at Iowa City that answered the description of Price. The paper said he was found hanging to the rafters in the cabin where he lived. I never made any effort to ascertain the facts, for I never heard of his going back to Iowa City. I had no friends there that I could write to, and I did not know what to do to find out. I don't know which way he went, or how he went from Iowa City. He had no relations there, or in any other place that I know of. He was an old bachelor when I married him, and a farmer. He lived in Iowa City the first time about four months, and the last about three months. Our place was about two miles from the court-house. He had few with whom he visited; went down town once or twice a week.”

CROSS-EXAMINATION.

“I was married to Thomas as Sylvia Preston. I came to Omaha in 1872 or 1873. I came here from Osceola, where I had lived eight months. Before going to Osceola I lived in Chicago a few months. I went to Chicago from



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Thomas v. Thomas.

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Elgin, Ill., where I had lived a year and a half. I went to Elgin from Chicago, where I lived most of the winter of '70. I came from Red Wing, Minnesota, to Chicago in 1869. I lived in Red Wing two or three years. Before going to Red Wing I lived at Lake City, Minn. I went from Iowa City to Lake City in 1868. I have never been back to Iowa City since I left there in 1868. Price left me July 8, 1868. I don't know why he left, except he got mad. There were unpleasant feelings between us when he left. We built a house in 1868. I remember that a Mr. Brant or Grant did some work on the house. When he went off he said "good-bye," and I said "good-bye." That is the last I ever saw him; I don't know where he went; I left there about Oct. 8th or 10th, same year. I don't know whether he is dead or not. I don't know who told me he had committed suicide; can't tell whether man, woman, or child, it was so long ago; I can't tell where I was at the time. The last time he left he told me he never would come back."

The defendant also read in evidence the depositions of eight witnesses, residents of Iowa City, Iowa, and vicinity, each of whom testified to having known or having had some knowledge of Samuel Price, in or near Iowa City, about the year 1868. None of them were on terms of intimacy with him. They all agree that he left that place in or about 1868. None of them fix the date of departure so as to locate it as being prior to September 1 of that year. None of them had ever seen or heard of him since he left; nor did any of them ever make enquiry, or have any expectation or desire to hear of him. The defendant then called Andrew Frick as a witness in her behalf, who testified that he knew a man named Samuel Price, at Iowa City; knew him first in 1868. Witness was in business there. "I met him about the time I went into business there, in the spring of 1868, and knew him from that time up until the winter of '68. I stayed there through the

winter of '68, but he left all at once, and I never saw him afterwards. \* \* \* I can't fix the date Price left. It was in the fall of 1868. I remained there until the fall of 1869." Upon his cross-examination, the next day, the witness testified: "I can't tell exactly how late in the fall of 1868 I last saw Price; I think it was towards winter. Yesterday, when the matter was mentioned to me, I could not tell; but I have looked over some papers that I have, and it was in November, 1868, that I had a certain transaction, and I know I saw Price not long before or after that. I again say that it was in the fall of 1868 that he left. I will not say he wan't there in 1869."

The plaintiff on his part produced the deposition of Charley Cartwright, of Lucas township, Johnson county, Iowa, who testified to having known Samuel Price and wife, of that vicinity, in the summer of 1868; that Mr. Price left that fall and came back in the spring of 1869. "I don't know how long he stayed on his return to this vicinity. I saw him twice. The last time he was on the road and said he was going to Oskaloosa. This was in the spring of 1869. I can't say when, but it was before June. I have not seen or heard of him since. The last I saw of Mrs. Price was in the fall or early winter of 1868. In 1868 they lived together as husband and wife."

Plaintiff also read the deposition of Thomas B. Grant, of Lucas township, near Iowa City, who testified that he was acquainted with Samuel Price and Sylvia E. Price in 1868, when they lived near Iowa City; that "Mr. Price went away about Sept. 1, 1868, and she left probably in November after; they lived together as husband and wife. \* \* \* I saw Price the last time in the spring of 1869. I should say in the last of April or first of May; I met him on the streets of Iowa City and had a conversation with him. I have not heard of Mrs. Price since she left; I have not seen Samuel Price since the spring of 1869, nor have I heard of him."

Also the deposition of Eliza A. Grant, wife of Thomas B. Grant, who testified to having known Samuel Price and Sylvia E. Price, his wife, in 1868; that she had a conversation with Sylvia E. Price shortly after Samuel Price left, in which she told her that Samuel Price had left her because he was afraid she was going to poison him, and that Price had gone off mad.

Also the deposition of D. A. Jones, of Iowa City, who testified that in 1868 and in 1869 he lived on a farm near Iowa City. "I knew Samuel Price; first became acquainted with him in 1868. He went away in the fall or winter of 1868; he came back the next year in 1869; then he left, since which time I have not seen him or heard from him."

Plaintiff also called J. C. Darbin, of Omaha, who testified as follows: "Live in Omaha; am a carpenter; I lived in Iowa City and vicinity from 1863 to 1878; I knew Samuel Price; first in 1868; not much acquainted with him; I know him when I see him; the last time I saw him was in Iowa City; was between the 20th and 30th days of May, 1869; I knew him when he lived near Iowa City, but was never at his place; at that time I was in the saw-mill business." Upon cross-examination witness referred to memoranda of business transactions, which he testified enabled him to refresh his memory and state positively as to the time when he last saw Price as above stated, etc.

The sole issue involved in this case is, whether the man Samuel Price was alive or dead at the date of the intermarriage of the parties, to-wit, September 1, 1875. The burden rests upon the defendant to establish by a preponderance of the evidence that he was deceased prior to that day. This she has undertaken to do by proving that he left the place of his former residence more than seven years before that day and has never returned, nor has been heard of by any one there or elsewhere to her knowledge.

If she has succeeded in doing this it will be conceded that she has established a defense. Greenleaf states the law to be that, "where the issue is upon the *life* or death of a person once shown to have been living the burden of proof lies upon the party who asserts the death. But after the lapse of seven years without intelligence concerning the person the presumption of life ceases and the burden of proof is devolved upon the other party." 1 Greenleaf's Evidence, § 41. In the case of *Cox v. Ellsworth*, decided at the present term, we had occasion to consider some of the limitations and exceptions to the rule of law as above quoted, but for the purposes of this case such limitations or exceptions need not be considered.

It is seldom that a court of equity feels constrained to reverse the finding of a jury upon a question of fact, but there are cases in which to do so is a plain duty, and I think this is such a case. From the testimony of the defendant it is clear that Price, her husband, left her in anger and under a sense of wrong, with no intention of returning to her. Nor is there any evidence of his having any intention to ever return to Johnson county, Iowa, nor that he had any tie of family, friendship, or property to tend to bring him back there. Even the defendant herself left almost immediately and removed to Minnesota. Nevertheless, had he remained away for seven years without having been heard of, there or elsewhere, so far as known, by the cold rule of law the presumption of his being still alive would cease. But here we have the testimony of several uncontradicted and unimpeached, disinterested witnesses that he did return and was seen in life within considerably less than seven years prior to the date of the marriage of the defendant with the plaintiff.

The defendant, therefore, failed to establish her defense, that her husband, Samuel Price, had been absent for seven years, so that his death might be presumed at the time of her marriage with the plaintiff, and the jury had

no evidence before them which sustains such finding. The evidence of the defendant herself is of little or no weight from the fact that she left the vicinity of the former residence almost immediately after the alleged departure of her husband, and took up her residence in a distant state; and that of the other witnesses offered by her is scarcely stronger, for none of them had more than a passing acquaintance, nor any business or social relations with Price; and some of them admit that he might have returned to Iowa City or vicinity at any time during the next seven years after his departure and they not have known or heard of it.

The judgment of the district court is therefore reversed, the verdict set aside, and a decree will be entered in this court for the plaintiff as prayed in the petition.

DECREE ACCORDINGLY.

The other judges concur.

19	89
30	596

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SCHOOL DISTRICT NO. 42, OF PAWNEE COUNTY, PLAINTIFF IN ERROR, v. FIRST NATIONAL BANK OF XENIA, DEFENDANT IN ERROR.

1. **School District Bonds.** The bonds sued on purport to be signed by Peter Robertson, moderator, John G. Winckler, director, and William Richards, treasurer. They were dated October 16, registered October 23, and negotiated and issued by the district after the latter date. The said William Richards having been appointed director, and having accepted said office October 22, *Held*, That he will be presumed to have signed the said bonds after his appointment, notwithstanding the date of the bonds.
2. ——. There was evidence to the effect that the name of John G. Winckler, director, was not placed on the bonds by his own hands; that he being of advanced age and feeble health had

about that time always made use of his son as his amanuensis to write his name to all papers, and the bonds were signed in that way; and there also being evidence that Mr. Winckler treated the signature purporting to be his to the bonds as his own, by participating in the negotiation and sale of the bonds, *Held*, That the bonds are the valid bonds of the district.

3. —: STATUTE OF LIMITATIONS. There being evidence that the county commissioners levied taxes on the taxable property in said school district for the purpose of paying the interest on said bonds, and to provide a sinking fund for the final redemption of the same; that such taxes were collected by the county treasurer and paid on said bonds within five years next before the commencement of said action; *Held*, That such payment was sufficient to take the bond upon which it was paid and endorsed out of the statute of limitations.

ERROR to the district court of Pawnee county. Tried below before BROADY, J.

*T. Appleget & Son*, for plaintiff in error.

*G. M. Humphrey*, for defendant in error.

COBB, J.

This action was brought in the district court of Pawnee county by the defendant in error against the school district, plaintiff in error, on two papers purporting to be the bonds of said district, issued for the purpose of borrowing money to build a school-house. The plaintiff claimed in its petition to be a *bona fide* purchaser of the bonds, for value, before maturity, in the regular course of business, and without notice of any defense to or defect in the said bonds.

The defendant made answer in which it denied that there ever was a regular or legally constituted meeting of the electors of the district which authorized the issuance of bonds; denied that the school district made payments on said bonds as set forth in the petition, or authorized any one to make them; denied that the cause of action

arose within five years; denied that the plaintiff is an innocent purchaser before due for value; denied the indebtedness; denied that the person who signed his name to the bonds as treasurer was at the time treasurer of the district; and denied that the defendant executed the bonds in controversy. There was a trial to the court (a jury being waived by both parties) which found for the plaintiff. A new trial being refused and judgment rendered for the plaintiff, the cause was brought to this court on error. Three principal points are relied on:

1. The court erred in admitting the bonds sued on in evidence.
2. The court erred in admitting the books of the county treasurer in evidence.
3. The court erred in admitting the books of the county clerk in evidence.

Under the first point it is not denied that the bonds are fair on their face, and each accompanied by a certificate showing that they were regularly registered according to the requirements of the statute then in force. But the bonds bear date the 16th day of October, 1873, and are signed by John G. Winkler, director, Peter Robertson, moderator, and William Richards, treasurer; while it appears that at that date H. C. Mayberry was the treasurer of the district. According to the county clerk's certificate, the bonds were registered on the 23d day of October, and the evidence is conclusive that they were not in fact issued or parted with by the officers of the district until on or after that date, and it appears by the records of the school district, plaintiff in error, received in evidence without objection, that William Richards was appointed treasurer of said school district on the 22d day of October, 1873. This was done at a special meeting and to fill the vacancy caused by the removal of H. C. Mayberry. As I understand it, the true date of the issuance of bonds by a municipal or other corporation is the day when it actu-

ally parts with the control or custody of them pursuant to contract, and not necessarily the day of the date which they bear. There is nothing in the law which requires it, nor is it by any means a universal custom or practice for all of the officers of a corporation who sign bonds or other commercial paper to sign the same at the same time. And, accordingly, it appearing that William Richards was not district treasurer on the 16th, the day upon which the bonds bear date, and was such treasurer on the day on which they were registered, and a day prior to their being actually issued by the district, he will be presumed to have signed them on the latter day when he might lawfully do so, rather than on the former, when he might not.

There was evidence tending to prove that the name of John G. Winkler, director, to the said bonds was not in his own proper hand-writing. Such evidence was to the effect that Mr. Winkler, being of advanced age and feeble health, had, about that time, always made use of his son as his amanuensis to write his name to all papers, and the bonds in question were signed in that way. There was also evidence to the effect that said John G. Winkler treated the signature purporting to be his to these bonds as his own, by participating in the negotiation and sale of the bonds. These facts, being found for the plaintiff by the court, are conclusive of the validity of the bonds in the hands of a *bona fide* purchaser for value, before maturity, in the regular course of business, which the plaintiff below is conclusively shown to have been.

The second and third points arise upon the defendant's plea of the statute of limitations as to the bond for two hundred dollars, and will be considered together. The bond to which the above plea was directed became due and payable, according to its face, on the 1st day of October, 1875, and the action having been commenced on the 26th day of July, 1882, the claim was barred by the statute unless saved by a new promise or part payment made within five



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School District v. Bank.

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years next before that date. The plaintiff relied upon three partial payments made upon said bond by S. H. Cummins, treasurer of Pawnee county, to take said bond out of the statute of limitations, said payments having been endorsed on said bond by said county treasurer, and set out in the petition as follows: "Paid on the within note, March 22, 1878, twenty-five dollars; Paid on the within bond, April 30, 1878, \$60.25; Paid on the within bond June 15, 1878, \$54.00; Signed, S. H. Cummins, Co. Treas."

The legislature of 1875 passed an act (Laws of 1875, p. 185) which provided that it should "be the duty of the board of county commissioners of each county to levy annually upon all the taxable property in each precinct, or township, and school district, in such county, a tax sufficient to pay the interest accruing upon any bonds issued by such precinct, township, or school district, and to provide a sinking fund for the final redemption of the same; such levy to be made with the annual levy of the county, and the taxes collected with other taxes, and when collected shall be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity," etc. This act was declared to be unconstitutional and void by this court in a cause heard in 1880 (*B. & M. R. R. Co. v. Saunders County*, 9 Neb., 507), but nevertheless it was acted upon throughout the state for several years, and during the period of time covered by the principal transactions involved in this case other than the execution and sale of the bonds sued on. The books of the county treasurer and county clerk, introduced by the plaintiff on the trial of this cause in the court below, and upon the overruling of its objections to which the plaintiff in error bases its second and third points, were introduced to prove that for the years therein specified the county commissioners of Pawnee county levied a tax upon the taxable property in the said school district for the purpose of providing a sinking fund for the final redemption

Hubbart v. Walker.

of said bonds at maturity, and that the payments endorsed on said bond by S. H. Cummins, county treasurer, as hereinbefore stated, were made out of such fund. I think that the evidence was admissible. This money belongs to the district it was appropriated by the terms of the statute, then supposed to be valid and binding, and which was then being universally acted upon as such, and I think that the payment of such money, on the one hand, and the receipt of it, on the other, must be accorded all the legal effect of a direct payment by the district and receipt by the holder of the bond. I think that the evidence was admissible, and competent to take the case out of the operation of the statute of limitations.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SARAH A. HUBBART, PLAINTIFF AND APPELLANT, V.  
PARIS A. WALKER ET AL., DEFENDANTS AND AP-  
PELLEES.

**Real Estate: UNRECORDED DEED: LIEN OF JUDGMENT: SHERIFF'S DEED.** Land conveyed by McK. to W., May 13, 1869. Deed remained in the hands of W. unrecorded until May 22, 1880, when the same was duly recorded. On the 4th day of August, 1873, L. & B. filed a transcript of judgment in the office of the clerk of the district court of the proper county against McK. Execution issued thereon February 7, 1876. Levy made on land same day. March 11, 1876, sold by sheriff to G. Sheriff's deed on said sale June 20, 1881. Deed to G. supposed to have been recorded the same day. Deed from G. to H. In ejectment by H. v. W. *et al.*; *Held*, That W. holds the land by the title conveyed to him by McK. absolutely unaffected by the judgment of L. & B., or the legal proceedings thereon under which plaintiff claims. Judgment for defendants upheld.

19	94
48	80
19	94
54	724
19	94
57	62

APPEAL from Lancaster county district court. Tried below before POUND and MITCHELL, J.J.

*John S. Gregory*, for appellant.

*Ryan Brothers*, for appellees.

COBB, J.

This case was tried in the court below on a stipulation of facts of which the following is the substance :

"1. That on the 13th day of May, 1869, John M. McKesson was the owner in fee simple of the land in controversy, and on said day he executed and delivered to Paris Walker a warranty deed, good and sufficient in form, conveying to said Walker the said land.

"2. On the 11th day of June, 1869, the said Paris Walker duly filed said deed for record in the clerk's office of Lancaster county, and paid the fee required for recording the same.

"3. That the said clerk of Lancaster county duly endorsed upon said deed the date of filing, but upon entering the description of the land, described said land as situated in township 10 north, range six (6) east, instead of being situated in range seven (7) east, as was in said deed described.

"4. This misdescription was made upon the indexes, and upon the record of deeds. And after said clerk had so erroneously recorded said deed he returned the same to Paris Walker.

"5. On the 21st day of July, 1875, said Paris Walker sold and conveyed by warranty deed said land unto Simon Kelley, and said deed was recorded on July 22, 1875, in book "R" of deeds of Lancaster county, at page 18.

"6. On the 22d day of April, 1880, Paris Walker caused his deed of May 13, 1869, to be refiled for record,

and the same was properly recorded in book No. 4 of deeds, at page 344.

"7. On August 4, 1873, Leighton & Brown filed a transcript of judgment from the probate court of Lancaster county in the office of the clerk of the district court of said county against J. M. McKesson, and thereupon, the 7th day of February, 1876, execution was issued thereon, and under proceedings thereon deed for said premises was executed and delivered by the sheriff as is shown by exhibits attached to the stipulation and filed in this cause.

"8. The claim of title upon the part of the plaintiff is derived by mesne conveyance from the grantee in said last mentioned deed; and the same is regular in form.

"9. The said land is not and has not been in such actual possession by either party to this action, so as to charge either party with notice of—or by—possession."

It also appears from the record, or the exhibit attached to the stipulation and referred to therein, that the sheriff's deed under which the plaintiff claims the land was executed on the 20th day of June, 1881.

The least that can be claimed for the deed from John M. McKesson to Paris Walker is, that from the day of its date and delivery, May 13, 1869, to the day of its recording, April 22, 1880, it was an unrecorded deed, and after the latter date it is a recorded deed.

By virtue of the execution and delivery of the deed, the title to the land passed from McKesson to Walker, to all intents and purposes, so far as the question involved in this case is concerned, except that under the registry laws of the state until the deed should be recorded in the proper county the land still remained subject and liable to be applied to the payment of McKesson's debts. But in order to do this the creditor of McKesson seeking to apply it must take all the necessary legal proceedings for such application while the deed from McKesson to Walker remains unrecorded. So I understand the effect of section 16 of chap. 78, Compiled Statutes, which is as follows:

"All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or instruments shall be valid between the parties."

Had Walker neglected or failed to have his deed recorded or filed with the register for record until the sheriff's deed to Mrs. Gregory was filed for record, or, in the language of the statute, "first recorded," he would have lost the land, and as to her and the judgment creditors at whose sale she purchased, Walker's deed would be adjudged void. But he had his deed recorded fourteen months before she received hers, hence his title is absolutely unaffected by the legal proceedings under which she claims.

Wishing to decide this case squarely on the main legal proposition involved, the points raised by counsel for defendants will not be examined.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WM. E. WASHBURN ET AL., PLAINTIFFS IN ERROR, V.  
DANIEL MCGUIRE, DEFENDANT IN ERROR.

**Attachment: AFFIDAVIT: CASE STATED.** Affidavit for attachment contained, among others, the following allegation: "And that the defendant, D. McG., is about to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors." On motion to discharge the attachment on the ground and for the reason that the facts stated in the affidavit for attachment are untrue, and it appearing by affidavit that on the day of the issuance of the attachment the defendant executed and placed on record two deeds to his wife, by each of which he conveyed to her a lot of land, for a nominal consideration, respectively; and one of said conveyances being explained and shown not to be fraudulent by the respective affidavits of defendant and his wife, but the other conveyance not being explained, nor in any manner accounted for, or even alleged to have been made in good faith, or for a valid consideration, the order of the district court discharging said attachment reversed.

ERROR to the district court of Gage county. Tried below before BROADY, J.

*Babcock & Davidson*, for plaintiffs in error.

*Hardy & McCandless*, for defendant in error.

COBB, J.

Washburn Bros., plaintiffs, commenced an action against Daniel McGuire, defendant, for a balance claimed to be due them of \$388.36, and interest. The defendant made a general denial to the plaintiffs' petition. Plaintiffs also sued out an order of attachment in said cause, alleging as ground for attachment, "That the defendant, Daniel McGuire, is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond his creditors, and that he is about to dispose of his property, or a part thereof, with the intent to defraud his creditors."

Property of the defendant was attached under the said order. On the 18th day of September, 1885, defendant filed a motion to discharge the attachment for the reason that the facts stated in the affidavit for attachment are untrue.

At the hearing on the 1st day of October, 1885, the court sustained the said motion and discharged the said attachment. To reverse which order the said cause is brought to this court on error by the plaintiffs.

It appears that, pending the suit and before the service of the order of attachment, the defendant conveyed certain village lots to Jane B. McGuire, his wife.

The question raised by the motion of defendant was tried by affidavits. On the part of the defendant was filed his own affidavit, that of his wife, Jane B. McGuire, that of his attorney, A. D. McCandless, each of whom testified as to the facts and circumstances connected with the transactions complained of by plaintiffs, and those of nine citizens of Wymore, who testify as to the good character of the defendant, and their opinion of his innocence of the fraud charged against him.

The affidavit of the defendant, in addition to denying all fraud, fraudulent intent, or intention to dispose of his property, or any part thereof, for the purpose of placing it beyond the reach of his creditors, also sets out that all of the plaintiffs' claim except \$55.51 is secured by mechanics' liens on different parcels of real estate; also that "he conveyed said lot 15 in block 29 to Jane B. McGuire, his wife, for the reason that the money used in the purchase of said lot belonged to her, and said property was in fact hers, and that said transfer was made in good faith, and without any intention to defraud plaintiff," etc.

The affidavit of Jane B. McGuire, wife of defendant, alleges that lot 15 in block 29, in Wymore, was purchased and the improvements thereon made with her money, and that the said property was in fact hers, etc. But neither

she nor Daniel McGuire give any reason or offer any explanation for the conveyance to her by the defendant of lot 6 in block 27, in Wymore's addition to the town of Wymore, which, according to the affidavits of both of the Washburns, was conveyed by said Daniel McGuire to Jane B. McGuire on the same day, but by a different deed, as the other lot.

I think the affidavits filed on the part of defendant sufficient to change the burden of proof of fraud back upon the plaintiffs, except as to the conveyance of said lot 6 in block 27, in Wymore's addition; but there being no denial of the allegations of the original affidavit for attachment, so far as the same relates to that conveyance, such allegations must be deemed to be true.

The order of the district court is therefore reversed, and the said attachment restored.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	100
21	609
19	100
38	168
19	100
48	671
19	100
55	236

J. T. MCKINSTLER, PLAINTIFF IN ERROR, v. N. F. HITCHCOCK AND J. F. TOWNSEND, DEFENDANTS IN ERROR.

1. **Account Stated.** An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions. As distinguished from a mere admission or acknowledgment it is a new cause of action. It is not a contract upon a new consideration and does not create an estoppel, but establishes *prima facie* the accuracy of the items charged without further proof.
2. ———: **ACTION ON: DEFENSE: FRAUD: PLEADING: QUESTION FOR JURY.** In an action upon an account stated where the answer denies the allegations of the petition and alleges affirmatively that an account existed between plaintiffs and defendants, that plaintiffs were defendant's bankers, and that they, with



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McKinster v. Hitchcock.

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intent to defraud plaintiff, concealed from him the real condition of the account and failed to credit him with deposits made by him, and charged him with items with which he was not chargeable; *Held*, That the allegations of fraud contained in the answer were sufficient if proven to vitiate the account stated if one existed, and that the question of such fraudulent concealment should be submitted to the jury with other issues in the case.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

*T. Appleget & Son*, for plaintiff in error, cited: *Stenton v. Jerome*, 54 N. Y., 480. *Lockwood v. Thorne*, 11 N. Y., 170. *Daniels v. Wilber*, 60 Ill., 526. *Champion v. Joslyn*, 44 N. Y., 653. *Wilson v. Wilson*, 14 Com. Bench, 626. *Jones v. Dunn*, 3 Watts & S., 109. *Kennedy v. Goodman*, 14 Neb., 585. *Roberts v. Totten*, 13 Ark., 609.

*S. P. Davidson*, for defendants in error, cited: 1 Nash Pl. and Pr., 757. 5 Wait's Pr., 666. *Slee v. Bloom*, 20 Johns., 669. *Kronenberger v. Binz*, 56 Mo., 121. *Horan v. Long*, 11 Tex., 230. *Sutphen v. Cushman*, 35 Ill., 186. *Ruffner v. Hewitt*, 7 West Va., 585. *Terry v. Sickles*, 13 Cal., 427.

REESE, J.

The original action in the district court was upon an account stated. The allegations of the petition as it stood at the time of trial were to the effect that a statement of the account had been presented to plaintiff in error by defendants in error, who were bankers, on the 3d day of April, 1884, and which said statement was admitted by plaintiff in error to be correct, and that the balance thereby shown, \$4,863.80, was due and owing to defendants in error from plaintiff in error.

The answer of plaintiff in error denied all the allega-

tions of the petition except the fact that he did business at the bank of defendants in error. It is also alleged that defendants in error fraudulently charged certain sums of money to plaintiff in error, and with intent to defraud him failed to give him credit for certain sums deposited in the bank. That the overcharges and failure to credit were made and omitted with the fraudulent intent and purpose of deceiving and defrauding plaintiff in error. It is further alleged that defendants in error transacted all the business of plaintiff in error as his bankers, and that the statements of accounts made by defendants in error were fraudulently and intentionally so made and done by defendants in error as to conceal from plaintiff in error the true condition and standing of the business transactions between them, and that plaintiff in error was thereby deceived as to the true condition thereof, and that there was justly due plaintiff in error, after allowing all proper credits, etc., the sum of \$6,020.19, for which judgment was demanded. A trial was had to a jury, which resulted in a verdict and judgment in favor of defendants in error, who were plaintiffs below.

It is not deemed necessary to notice the testimony introduced on the trial at any great length, but we deem it sufficient to say that both parties maintained the allegations of their pleadings to quite a considerable extent, and as another trial must be had on account of what we deem sufficient error in the record, we will refrain from any expressions of opinion as to the merits of the case as shown by the testimony. A number of instructions were given to the jury by the court, some of which were given at the request of the parties and some on the court's own motion. As they were in the main harmonious, and no objection can be made upon the ground that they were conflicting, it would serve no good purpose to set them out in full, but we quote such as may be deemed necessary to fully present the principle involved in the case upon which it was tried.

The first given on behalf of defendants in error is as follows:

"The court instructs the jury that if plaintiffs have proved by a fair preponderance of the evidence that at or about the time mentioned in the petition they presented to defendant a statement of the account between the parties, showing a balance due from defendant to plaintiffs, and that soon thereafter defendant came into plaintiffs' bank and had certain items in said account explained by plaintiffs, and after said explanation was made said defendant admitted said account was correct and showed the correct amount due plaintiffs from defendant, then plaintiffs have established an account stated, and are entitled to recover the amount of said balance admitted to be true and interest from May 3d, 1884, at seven per cent per annum.

If the account stated has been proven as alleged, that fact is conclusive of this case and of the amount due plaintiffs from defendant, and you should not inquire into the correctness or incorrectness of any of the items of the account, but find for plaintiffs as above stated."

Plaintiff in error requested the court to give the following instruction:

"You are instructed that frauds, errors, and mistakes in an account are always subject to correction in the courts." This was changed by adding the following: "But this, so far as this case is concerned, applies only to the open account alleged in the answer and not to the account stated alleged in the petition. As to the account stated there is no issue in this case except whether or not the plaintiffs' allegations on that subject are true."

An account stated is defined to be an agreement between persons who have had previous transactions, fixing the amount due in respect to such transactions and promising payment. As distinguished from a mere admission or acknowledgment it is a new cause of action. It is not now regarded as a contract upon a new consideration, and does

not create an estoppel, but it establishes *prima facie* the accuracy of the items without further proof. Abbott's Trial Ev., 458. The promise may be implied. An express promise to pay is not necessary to be alleged or proved. *Claire v. Claire*, 10 Neb., 54.

Whether established by express or implied assent the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in nowise concluded by the admission implied from his silence after it was rendered. It is conclusive unless some fraud, omission, or inaccuracy is shown, and ordinarily the burden is upon him to do so. But he is not estopped from doing so, even though it is signed by him. *Id.*, 462. 1 Wait's Ac. & Def., 198. Even though he should give a note for the balance. *Morton v. Rogers*, 14 Wend., 576. *Miller v. Probst*, Add. (Penn.), 344. *Kirkpatrick v. Turnbull*, *Id.*, 260. *Nicholls v. Alsop*, 6 Conn., 477. *Perkins v. Hart*, 11 Wheat. (U. S.), 237. See also 1 Wait's Ac. and Def., 195, and cases there cited. 6 *Id.*, 430. As to the conclusiveness of an account stated, see further *Farnam v. Brooks*, 9 Pick., 212. *Roberts v. Totten*, 13 Ark., 609. *Rembert v. Brown*, 17 Ala., 667. *Bankhead v. Alloway*, 6 Coldw. (Tenn.), 56. *Chatham v. Niles*, 36 Conn., 403. *La Trobe v. Hayward*, 13 Fla., 190. *Shirks' Appeal*, 3 Brewst., 119. *Kronenberger v. Binz*, 56 Mo., 121.

As to whether the mere acceptance of a customer's bank book, written up and returned to him by the bank, together with the checks, without objection as incorrect, is to be held binding upon the customer as an account stated, is a question upon which authorities differ, and which it seems is not necessary here to decide, as it is claimed by defendants in error that plaintiff in error assented to the statement a few days after it was made. Upon this point see Morse on Banks and Banking, 358, and cases there cited. But perhaps the better rule is, that if such an ac-

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*McKinster v. Hitchcock.*

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count be retained for an unreasonable time without objection it will be treated as an account stated and *prima facie* correct. *Ruffner v. Hewitt*, 7 West Va., 585. *Copwood v. Bolton*, 26 Miss. (4 Cush.), 212. *Darlington v. Taylor*, 3 Grant (Pa.), 195. *Terry v. Sickles*, 13 Cal., 427. Yet this must depend upon the special circumstances of each case. *White v. Hampton*, 10 Iowa, 238.

The doctrine here stated is substantially admitted by defendants in error, but it is insisted that under the pleadings proof of such facts as would vitiate the account stated was inadmissible, as the answer did not contain the allegations necessary to admit such proof. That in order to attack the stated account the defendant in the action must admit the allegations of the petition in that behalf and then allege that there was fraud or mistake in the settlement. We are not ready to adopt this proposition. While it is true that the defenses pleaded must be consistent, yet our code permits a defendant to plead as many defenses as he may have (sec. 100, civil code) so long as they are consistent. The answer denies that there was an account stated between the parties. We think the answer is fully sufficient to entitle plaintiff in error to have the question of the correctness of the account submitted to the jury by proper instructions, and that the court erred in giving the first instruction asked by defendant in error and in the modification or change made in the first asked by plaintiff in error. As we understand and believe the law to be upon this question it is that the account stated having been alleged by defendants in error and denied by plaintiff in error the burden of proof was upon defendants in error to establish this allegation of their petition. If the fact was proven as alleged, that fact was not "conclusive of the case and of the amount due plaintiffs," but the plaintiffs were *prima facie* entitled to recover, and the burden of proof to show the fraud alleged was upon the defendant in the action, and, unless established to the satis-

faction of the jury, the claim of defendants in error would stand as proven. If the fraud was proven the account stated would be vitiated thereby and the plaintiff in the action could not recover thereon.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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THE STATE OF NEBRASKA, EX REL. NATHAN K. GRIGGS,  
V. CHARLES W. MEEKER.

1. **Public Records: FEE BOOK.** The record known as the fee book, kept by the clerk of the district court, is a public record.
2. ———: **EXAMINATION.** Any person interested in the examination of a public record may do so free of charge.

ORIGINAL application for mandamus.

*N. K. Griggs, pro se.*

*Abbott & Abbott, F. I. Foss, and Ryan Brothers, for respondent.*

REESE, J.

This is an application for a writ of mandamus to the clerk of the district court directing him to allow the relator to examine the public records of his office. It is alleged that respondent refuses to allow the inspection without the payment of the sum of fifteen cents for each examination. The record sought to be examined is the "fee book," which is kept as required by section 321 of

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 Bunz v. Cornelius.
 

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the civil code. The relation shows that the relator is interested in the examination of the record referred to. Section 1 of chapter 74, Comp. Stat., provides that "all citizens of this state and all other persons interested in the examination of the public records are hereby fully empowered and authorized to examine the same free of charge during the hours the respective offices may be kept open for the ordinary transaction of business."

The fee book is a public record.

No defense has been plead to the relation and no reason is shown why the writ should not issue.

It is the duty of respondent to allow the examination of the record.

The writ is allowed.

JUDGMENT ACCORDINGLY.

The other judges concur.

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LOUISE BUNZ, APPELLANT, v. JOHN C. CORNELIUS,  
APPELLEE.

1. **Trial: ORIGINAL PETITION AS EVIDENCE.** When a cause is being tried upon an issue formed by an amended petition, answer, and reply, the original petition, if inconsistent with the amended petition, is competent evidence for the purpose of proving admissions inconsistent with the claim and testimony of plaintiff upon the trial. And where such pleading is verified by the oath of the party filing it, and it is shown that the contents were known and understood at the time of such verification, and where the determination of the cause depends upon the unsupported testimony of the party thus contradicted, such evidence would be entitled to weight. But if the testimony offered by both parties tended to support the allegations of the amended petition, and it is not shown that the party verifying the original pleading knew its contents, not understanding the

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language in which it was written, the rule would not apply with so much force.

2. **Specific Performance: SALE OF PART OF HOMESTEAD.** Where a defendant and his wife sold a part of their homestead and executed their joint conveyance therefor and delivered the deed to the purchaser, and where it was afterwards ascertained that the premises were encumbered by judgment liens which could be enforced against the deeded premises and the deed was surrendered to the seller and a lease taken for six years, with the understanding and agreement that at the end of that time the judgment liens would be canceled and the contract of sale then carried out, the purchaser will be entitled to receive the deed at the expiration of the six years, or when the judgment liens are removed, and such right will date, so far as the homestead rights of the grantors are concerned, from the delivery of the deed by them.
3. **Conveyance by Deed: REDELIVERY OR SURRENDER DOES NOT DIVEST TITLE OF GRANTEE.** Where a deed of conveyance of real estate is executed and delivered to a purchaser, such execution and delivery vests the title of the grantor in the grantee and a redelivery or surrender of the deed unaccompanied with the purpose of rescinding and annulling the contract of purchase will neither divest the grantee of the title nor operate as an estoppel against him.
4. **Specific Performance: EVIDENCE: DECREE.** In an action for the specific performance of a contract for the sale of real estate where the prayer is for general relief it was *Held*, That if the facts stated in the petition and proved on the trial showed that the contract had been performed and the conveyance made, and that the proper relief would be a decree quieting the title of the plaintiff, such decree should be entered as would protect the plaintiff in the enjoyment of the property in question. But that such decree should be subject to the payment of the unpaid part of the purchase money as is shown to be unpaid and of the taxes paid by the defendant as accrued liens after the execution and delivery of the deed.

APPEAL from the district court of Hall county. Heard below before NORVAL, J.

*Thummel & Platt*, for appellant.

*O. A. Abbott*, for appellee.



REESE, J.

This is an action for the specific performance of a contract for the sale of real estate. The decree being against the plaintiff, she appeals.

The substance of the allegations of her petition is, that in the year 1876 the defendant was the owner of the real estate in question, and that he sold the same to plaintiff for the sum of \$125.00. Of this amount, \$75.00 was paid in cash and the remaining \$50.00 was to be paid in one year from the date of purchase. A warranty deed was executed by defendant and his wife and delivered to plaintiff, whereupon she took possession of the property, making lasting and valuable improvements thereon, and has resided thereon as her home ever since. That about the 7th day of July, 1877, defendant called upon plaintiff and told her that, owing to the judgments against him, he could not make a good title to the property, and, the deed not being yet placed on record, he would better take it and execute to her a lease for six years, at the end of which time he would have the judgment liens removed and would then make a good deed; or, if at that time the liens were not canceled, he would make another lease for ninety-nine years; that the property was hers, and she might make all the improvements desired, and he would give her a writing or lease which would be as good as a deed, until the matter was fully cleared up, when she could pay him the unpaid \$50.00, and the title would be conveyed to her free from incumbrance; or, failing to be able to do so, he would execute the long term lease. Both parties were Germans, plaintiff being unable to read or speak the English language. That defendant delivered to her a writing, stating that it was a written contract containing the terms of the agreement, which she received supposing it to be such. Having full confidence in the word and integrity of defendant, she laid it away, ignorant of its real contents. That in fact the

writing did not contain the whole contract as represented to her when she signed it, but was simply a lease for six years, the rent reserved being the sum of \$75.00 so paid in advance. That defendant had removed the judgment liens and was now able to convey the property, but that he refused so to do, and demanded its possession. She having tendered the \$50.00 now due upon the contract, seeks a reformation of the contract and its specific performance.

The answer admits the ownership of the premises, the sale, payment of \$75.00 as part of the purchase price, the execution of the deed, the possession by plaintiff of the property, the return of the deed, the existence of the judgment liens, the making of the improvements to the extent of three hundred and twenty-five dollars, the execution and delivery of the lease, and the tender of the sum of \$50.00 and refusal to execute the deed or long-term lease. He alleges that after the sale and execution of the deed by himself and wife, the plaintiff returned the deed to him and refused to accept it, and at that time he was in straitened circumstances and could not refund the \$75.00, and in order to satisfy her therefor he executed the lease for six years, which she received in full satisfaction for said payment, and that the contract of sale was then terminated, the lease being in accordance with their agreement, there being no contract, either verbal or otherwise, for the conveyance of the premises or the execution of the long-term lease. He alleges the possession by plaintiff of the premises to be under and by virtue of the lease, and not by virtue of any other contract or agreement, and that all the improvements which were made were made under the lease, with full knowledge of its contents, and that it terminated on the 7th day of July, 1883. That all the conversation concerning the contract and lease was in the German language, and was fully understood by plaintiff, and the contents of the lease were fully explained to her. That he never has and does not claim the improvements made upon the property, and

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Buns v. Cornelius.

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is willing that plaintiff may remove them. He alleges that he has paid all taxes upon the property during the occupancy of plaintiff, including the construction of sidewalks, none of which have ever been paid or offered to be paid by plaintiff. That at the expiration of the lease and plaintiff's refusal to surrender he commenced an action against plaintiff for the forcible detention of the premises and obtained a judgment of restitution, but that plaintiff had appealed therefrom and the cause was pending in the said district court on the appeal. It is also alleged that the supposed agreement was an agreement for the purchase of real estate, and that no note or memorandum thereof was in writing, and also that if any such agreement was made it was not to be performed within one year, and that it was void by the statute of frauds. That at the time of the making of the said contract of sale and at all times since said date he has been the head of a family consisting of a wife and children, and that said premises constituted a part of his homestead, and that his wife, who was living on the 7th day of July, 1877, never consented to such sale or lease, and that since the death of his first and marriage to his present (second) wife she has never given her consent to such sale or conveyance, and that for that reason the plaintiff ought not to have her action against him.

The reply denies the allegations of the answer.

The question presented upon a review of the testimony is not so much upon a conflict of the testimony, although somewhat conflicting, but rather as to the proper conclusions to be reached and inferences to be drawn from the facts as clearly proved or conceded by the testimony of the defendant and his witnesses. Taking the case together as a whole as presented by the proofs, we think it unquestionably appears that defendant and his family were residing together upon a tract of land, all of which was a homestead and exempt from levy by execution. That judgments existed against him which were a dormant lien upon the

whole property, but which was unknown at the time by both parties to this suit; that acting in the belief that defendant could convey a good title to the premises in question plaintiff purchased the same, being a small portion of the homestead, for the sum of \$125, paying \$75 in cash and agreeing to pay the remaining \$50 at the expiration of one year, a warranty deed being executed by defendant and his then living wife and delivered to plaintiff; she taking possession of the property and making improvements thereon to the extent of \$500 in value, consisting of a dwelling-house, etc. Plaintiff was a widow and without means, the \$75 having been in part wages due her for labor, failed to get her deed recorded, and after the lapse of about six months it was discovered that a conveyance could not be made without rendering the property liable to levy upon execution by the creditors of defendant. The deed was then surrendered to defendant by plaintiff and the lease for six years executed. The plaintiff testifies in substance as alleged in her petition as to the circumstances under which the lease was received. Her testimony is supported by the testimony of George H. Thummel, Mrs. Carlotta Bartenbach, C. Schlotfeldt, and T. Sumers, who all testify in substance that at various times defendant stated to them that when he found the property was so encumbered that he could not make a clear title he took the deed back and gave her a lease for six years, by which time he expected to free the title from the liens and would then make a good deed, or if the liens still existed he would make a lease for ninety-nine years. The defendant, when testifying on his direct examination in his own behalf, in answer to the question as to what was said to the plaintiff at the time he gave her the lease, answered as follows: "I told her when I found out I could not sell there was a heavy lien on that property. I told Mrs. Bunz, 'The paper you have got is not worth anything and you pay \$75 onto it and for them \$75 I

give you a six years' lease, and when this six years is gone by I may have a different thing, and then I may be able to sell it to you or lease it to you for ninety-nine years.' That is the way I talked in German. She says, 'All right,' so we made the lease and she gave me back the deed." In his cross-examination the following occurs:

Q. You say you told her what was in the lease. Now, did you not tell her further than that that at the end of this time you would give her a deed or a lease for ninety-nine years?

A. Yes, sir; I told her in six years we might have different times, so I could be able to pay off those liens on the property and then I might sell to her or give her a lease for ninety-nine years.

Q. You have paid all these liens up now, have you not?

A. Yes, sir.

Q. And you have a clear title there, have you not?

A. Yes, sir.

Q. And you have refused to give her the deed or make her the lease, have you not?

A. Yes, sir.

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Q. You and Mrs. Bunz have lived next door to each other for a long time?

A. Yes, sir.

Q. The family relations were all good, were they not?

A. Yes, sir, about half the time.

Q. Now you say you were at the time you told her you might be in better circumstances, and you would deed it to her?

A. Yes, sir.

It is true that the witness afterwards, in answer to certain questions propounded by the court, testified that he did not agree to make the deed, nor the lease at the end of the six years, and that he did not represent to plaintiff

that any such provisions were contained in the lease. But by the whole record it is clearly shown that the contract was made as claimed by plaintiff.

A former petition filed by her was introduced in evidence by defendant, in which it is alleged that the agreement or contract to convey or execute the long lease rested in parol and was made at the time of the delivery of the lease. It is claimed that this petition is an admission or declaration under oath inconsistent with the allegations of the amended petition and her present claim. While this is to some extent true, and if the case depended upon her unsupported testimony, and it were shown that she knew the contents of the original petition, it might be entitled to much weight. Yet in view of the testimony of the other witnesses and the conceded circumstances of the case we cannot see that it should be entitled to any great consideration in arriving at the proper conclusion as to the merits of the case.

We agree with counsel for defendant that ordinarily where a party enters into possession under a lease and holds possession under it and in accordance with its terms, with full knowledge of its contents, no action would lie to enforce a specific performance of a different parol contract. This, of course, subject to the exception that if possession were surrendered and taken under the parol contract the rule would be otherwise.

It is insisted that, assuming the contract to have been made as claimed by plaintiff, yet the property being of the homestead of defendant and he having a wife then living, his contract, whether written or oral, would have been void and could not now be enforced. This contract was made in the year 1876 and the lease in 1877, prior to the enactment of the present homestead law, which prohibits the transfer, etc., of the homestead by either the husband or wife without being joined by the other. But were this not the case we cannot see that the question of

homestead can enter into the case. The husband (defendant) and wife joined in the execution of the deed in 1876. By this the title to the property was conveyed to plaintiff. It has never been conveyed back to them. The surrender of deeds of conveyance cannot serve the purpose of divesting a grantee of the title conveyed by the deed. 3d Washburn Real Property, 285. Tiedeman on Real Property, § 812. *Souwerbye v. Arden*, 1 Johnson Ch., 255. *Connelly v. Doe*, 8 Blackford, 320.

At most it could work an estoppel, and then only when the surrender was for the purpose of annulling the contract.

Therefore, if plaintiff is entitled to recover it must be by the force of the conveyance to her, the vesting of the title in her by such conveyance, and the fact that she has not been divested of that title, and that her conduct in accepting the lease will not create an estoppel against her, and thus prevent her enforcement of her contract of purchase.

It is very clear to the mind of the writer that the surrender of the deed by plaintiff was not for the purpose of terminating her contract of purchase, but rather that the contract might be perfected by the execution of such contracts or writings as defendant might see proper to execute for that purpose. She had confidence in him. He was one of her countrymen. She evidently looked to him with faith that he would perfect her title. Hence her ready response of "All right," when he, according to his own testimony, told her her paper (the deed) was not worth anything, and at the end of the six years he might "have a different thing," etc. Neither could the rights of the parties be changed in the least by the death of defendant's wife after the execution of the deed and possession thereunder and his remarriage. The rights of plaintiff were vested under the contract and conveyance of defendant and his former wife. Those rights have never been divested.

It is shown that certain taxes have been paid by defendant since the contract was entered into. These taxes should have been paid by plaintiff. Whether they were paid before or after they became delinquent, with or without the knowledge of plaintiff, and the amount thereof, is not shown. He had the right to pay them, if necessary, to protect his security for the unpaid part of the purchase price which was tendered, but whether before or after the payment of the taxes is not clear. Neither can we ascertain from the record whether the taxes were paid before or after the commencement of the suit. But as they were a lien on the property equity would require that they be refunded with legal interest.

The prayer of the petition, as well as for a specific performance, is for general relief, under which such relief may be given as equity may require. *Johnson v. Phifer*, 6 Neb., 406. Plaintiff is clearly entitled to have her title quieted and the contract of sale carried out by defendant. The decree of the district court will therefore be reversed and a decree entered in this court quieting plaintiff's title to the property and requiring defendant to redeliver to plaintiff the deed executed in 1876, if such delivery can be made, and if not that this decree stand in lieu thereof upon condition that the unpaid part of the purchase price, together with all taxes, be paid into court for defendant within ninety days after the amount of such taxes, including that paid for the construction of a sidewalk, shall be ascertained, such taxes to draw interest at the rate of seven per cent per annum after their payment. If the parties can agree upon the amount of taxes paid and stipulate as to the facts, such agreement will be taken as the basis of the finding of the amount due defendant. Otherwise a reference will be ordered for the purpose of ascertaining the facts.

JUDGMENT AND DECREE ACCORDINGLY.

THE other judges concur.



JOHN MCPHERSON, PLAINTIFF IN ERROR, V. ALLURED  
N. WISWELL ET AL., DEFENDANTS IN ERROR.

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**Contract: RESCISSION: TRIAL: INSTRUCTIONS TO JURY.** There being evidence before the jury tending to prove a rescission by W. of the contract between him and M., an instruction stating the supposed facts of the case, and telling the jury that if they believed such facts from the evidence they should find for the defendants, but which instruction ignored and left out the question of rescission and the evidence thereof; *Held*, Erroneous, and a new trial awarded, although in other and former instructions the court had properly instructed the jury upon the law of rescission and its application to the case before them.

ERROR to the district court for Gage county. Tried below before POUND, J., sitting for BROADY, J.

*Hardy & McCandless and Babcock & Davidson*, for plaintiff in error, cited: *Eaton v. Redick*, 1 Neb., 305. *Gillet v. Maynard*, 5 Johns., 85. *Frost v. Clarkson*, 7 Cow., 24. *Minert v. Emerick*, 6 Wis., 355.

*Hazlett & Bates and T. W. Colby*, for defendants in error, cited: 2 Kent Com., 508. *Lamb v. Lathrop*, 13 Wend., 97. *Smith v. Loomis*, 7 Conn., 115. *Hadley v. Pugh*, 1 Wright, 554. *Sands v. Taylor*, 5 Johns., 895. *Frey v. Drahos*, 10 Neb., 594.

COBB, J.

This cause was before this court at the July term, 1884, when the judgment of the district court was reversed and the cause remanded. 16 Neb., 625. It seems that upon the second trial there was again a verdict and judgment for the defendants; and the cause is again brought to this court on error by the plaintiff.

The cause was tried in the court below the second time on the same pleadings as the first, except that before the

second trial the plaintiff, by leave of the court, filed an amended reply; but, as the pleadings were not very fully set out in the former opinion, I will copy the substance of the petition, answer, and reply.

## PETITION.

"At the times hereinafter mentioned the plaintiff was the absolute owner of and entitled to the possession of 19 combined reapers and mowers, consisting of eleven double rigged machines known as 'Marsh No. 4's,' and eight machines known as 'Valley Chiefs,' of the value of \$3,800. About December 25th, 1877, the defendants combined, confederated, and conspired together to cheat, defraud, and swindle the plaintiff out of said property and to unlawfully obtain possession thereof and place the same beyond the reach of the plaintiff. For the purpose aforesaid, and in pursuance of said conspiracy, the defendants falsely and fraudulently contrived between them a sham sale of said property from defendant Wiswell to defendant Norcross, and further, in pursuance of the same design and conspiracy aforesaid, fraudulently contrived to obtain possession of said property by means of a writ of replevin sued out by defendant Norcross in an action wherein this plaintiff was not a party, and further, in pursuance of the same conspiracy aforesaid, the defendants did at the time aforesaid wrongfully and unlawfully obtain possession of and convert to their own use and benefit all the said property, and placed the same beyond the reach of this plaintiff—to plaintiff's damage \$5,500, for which plaintiff asks judgment."

## ANSWER.

"1. Denies each and every allegation in plaintiff's petition contained.

"2. That on the 22d day of October, 1877, after the accrual of the cause of action in plaintiff's petition stated, and before beginning this action, James S. Marsh and

Elisha C. Marsh, the parties from whom plaintiff claims to have purchased the property in controversy, and under whom plaintiff claims and derives title to the property described in the petition—if he has or ever had any title thereto—and this defendant Wiswell by mutual agreement submitted all causes of action existing between them, including the cause of action set out in plaintiff's petition, which was then owned by said Marshes, to the arbitration of Elijah Filley, Wm. H. Fulkerson, and Charles G. Dorsey, who were to make and publish their award on or before January 22, 1878. That January 18th said arbitrators made and published their award (here follows a copy of the award), by which they found 'that on the 19th day of July, 1877, James S. and E. C. Marsh orally contracted' with the defendant Wiswell for the purchase of three sections of school lands and considerable personal property of said Wiswell, to be paid for in machines and money, and that the machines in question were on or about July 20th, 1877, by said Marshes turned over to said Wiswell in pursuance of said contract by said Marshes, and that Wiswell was entitled to said machines; and said answer avers that these machines were awarded to said Wiswell by said arbitrators, that plaintiff had no interest in said machines nor any part thereof at that time, but acquired his interest subsequent to said arbitration, from said Marshes; and avers that defendant has performed and offered to perform all conditions of said award on his part, that said Marshes have failed and refused so to do."

REPLY.

"1. Admits there was a submission and award in arbitration, and avers that thereafter the district court, to which said award was made returnable for final judgment, fully and completely set aside said arbitration proceedings and said award, and held the same for naught; and that this plaintiff was not a party to said arbitration proceedings.

"2. Avers that soon after July 19, 1877, defendant Wiswell, of one part, and James S. and Elisha C. Marsh, of the other part, rescinded and abandoned their contemplated contract referred to in said amended answer, which was only oral negotiations for a written contract, which was never made nor perfected; yet whatsoever there was of it the said parties fully rescinded and abandoned, and said Wiswell kept and retained all of said land mentioned in said amended answer, and also all the personal property therein mentioned.

"3. A general denial of all new matter and of every allegation in said amended answer not hereinbefore admitted."

The evidence at the last trial was about the same as at the first, except that there was some evidence tending to prove a rescission of the contract under which the defendants claim the machines in question by the defendant Wiswell.

The court then gave the following instructions asked by the plaintiff:

"2d. The jury are instructed that the Marshes, being the original owners of the machines described in the petition, if you believe from the evidence that said machines were embraced in the written contract or assignments by the Marshes to the plaintiff McPherson which have been introduced in evidence, then the plaintiff acquired whatever title the Marshes had in said machines at the date of said contracts or assignments, and if you believe from the evidence that at that time the Marshes still really owned said machines and that the same have been converted by the defendants, then you will find for the plaintiff.

"3d. The defense that defendant Wiswell purchased the machines in controversy of the Marshes prior to plaintiff's purchase of them is an affirmative one, and in order to maintain it defendants must prove such prior purchase by a preponderance of the proof, and unless you find that

prior to November 5th, 1877, defendant Wiswell purchased said machines of the Marshes you will find for the plaintiff if you further believe said machines were included and covered by said contracts of plaintiff.

"4th. If the plaintiff is entitled to recover in this action at all he is entitled to recover the value of the eleven Marsh No. 4's and eight Valley Chief machines on December 27th, 1877, together with interest thereon from that day to the present at the rate of seven per cent per annum.

"5th. If the parties to an alleged contract agree that it shall be reduced to writing in an instrument to be signed by them before it is considered complete, it will not be obligatory on them without the execution of such written instrument, and if you believe from the evidence defendant's claim to a purchase of the property in controversy by defendant Wiswell is based on negotiations between him and the Marshes for an exchange of lands and personal property from Wiswell to the Marshes, and of machines and money from the Marshes to Wiswell, intended by the parties to be consummated in a written agreement, but that it was never, in fact, so consummated in such written agreement, then you must find that no such purchase was made and Wiswell did not obtain title to said property in controversy.

"6th. If you believe from the evidence that even if there was a completed contract between the Marshes and Wiswell in relation to the machines in controversy, it is competent for you, if the evidence convinces you that such is the fact, to find that said contract was abandoned by the parties, in which case it will avail nothing to these defendants, and if you find that Wiswell sold and converted to his own use the property he claims was exchanged for said machines, having taken the same back and kept for his own or having sold it to other parties, then you may find that by so doing Wiswell so far abandoned said contract that the defense based thereon in this action must fail and you will find for the plaintiff.

"7th. If you should find there was a completed contract between Wiswell and the Marshes involving these machines, and that even if the Marshes first refused to comply with said contract, but afterwards Wiswell before offering to comply with his part of the contract made it impossible for him to comply with the same, that would amount to a rescission of the contract and no title to the machines passed under such contract.

"8th. If you find that the plaintiff became the owner of the machines in controversy, the assumed sale of said property by Wiswell to Norcross was a conversion thereof by both defendants which renders them both liable in this action for the value thereof and interest, and if defendants colluded together for the purpose of obtaining possession of said property, and were not entitled to the possession thereof, then you must find them both liable in this action for said value and interest for which you will find for the plaintiff.

"9th. Even if you are convinced that E. C. Marsh said to defendant Norcross and others that the property in controversy had been sold to defendant Wiswell, yet before he, defendant Norcross, bought the same of Wiswell he learned of the controversy between Wiswell and the Marshes about the title of the property, and the evidence satisfies you that said contract was not completed and said property was not really in fact sold to Wiswell, you will find for the plaintiff.

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"11th. The jury are instructed that you cannot consider any of the arbitration proceedings or papers or that part of the answer relating to the arbitration for the purpose of showing title or possession of the property in controversy in defendants or either of them, because the award was set aside by this court and all of said arbitration proceedings go for nothing.

"12 $\frac{1}{2}$ . The court further instructs the jury that what

was or was not involved or included in the suit heretofore pending in the United States court between McPherson and the Marshes is not involved in this case, as there has been no competent evidence introduced to prove that the title to said machines was involved in, or that the plaintiff lost whatever title he had to said machines by reason of said suit."

And at the request of the defendants the court gave the jury the following instructions:

"1st. The court instructs the jury that in order to find for the plaintiff (McPherson) you must be satisfied from a preponderance of the evidence that at the time of the commencement of this action the plaintiff was the absolute owner of the machines in controversy, and either had them in his possession or was entitled to the immediate possession of them, and that the defendants did wrongfully obtain possession of them and converted them to their own use."

To the giving of which the plaintiff excepted.

"2d. If you find from the evidence that one E. C. Marsh, acting for himself and his brother James S. Marsh, did in the month of June or July, 1877, turn over and deliver the machines in controversy to the defendant Wiswell, or to Thomas H. Harrison as agent for Wiswell, pursuant to a contract actually made and entered into, substantially as claimed by defendants, and that after that time Harrison held the machines as agent for the defendants or either of them, then you must find for the defendants."

To the giving of which the plaintiff then duly excepted.

"3d. Defendants claim the machines in controversy under a contract which they claim to have made with J. S. and E. C. Marsh, the same parties under whom plaintiff claims. The court instructs you that a failure to put said contract into writing would not invalidate it, if the parties had in fact made such a contract and partly performed it,

and the parties only intended the writing when made to be a memorial of the terms they had already agreed on and partly carried into effect. Under such circumstances the contract would be valid although it was never reduced to writing."

To the giving of which plaintiff then duly excepted.

"4th. The court instructs you that if you find from the evidence that the said James S. Marsh and E. C. Marsh did make the contract with the defendant Wiswell substantially as claimed by said defendant, and that the machines in controversy in this action were delivered to said defendant, or to Thomas H. Harrison, as his agent, under and by virtue of said contract, and as a part performance thereof, and that said defendant Wiswell was able and ready to perform said contract fully on his part, and only failed to fully and completely perform it on his part on account of the failure and refusal of said James S. and E. C. Marsh to perform it on their part, and it was wholly the fault of the said Marshes that the contract was not performed by the parties to it, then the plaintiff cannot recover in this action, and you will find for the defendants and give a verdict in their favor."

To the giving of which plaintiff then duly excepted.

"6th. If you find the contract was made between the Marshes and defendant Wiswell substantially as claimed by said defendant Wiswell, and that said defendant Wiswell delivered any personal property to said Marshes under said agreement, or tendered said personal property to said Marshes under said contract, then the title to said personal property passed to said Marshes, and they were from that time the owners of it, and if Wiswell afterwards took said property and converted it to his own use, said defendant Wiswell is liable to said Marshes or their assigns for the whole of said property, and the taking and conversion of said property by Wiswell under such circumstances would not in itself amount to a rescission of the con-



tract and authorize said Marshes or their assignees, the plaintiff, to sue Wiswell for the value of the machines in controversy, if they were turned over to said Wiswell under said contract and as part performance thereof. Provided that prior to the time said Wiswell took and converted said property so delivered or tendered to said Marshes, said Wiswell had complied or offered to comply with the terms of said contract on his part to be performed, and had duly tendered to said Marshes the deed or deeds and assignments of leases to be by him given and transferred to said Marsh."

To the giving of which plaintiff then duly excepted.

"7th. If you find from the evidence that there was a contract made between said Marshes and defendant Wiswell substantially as claimed by said defendant, and that said defendant was ready and willing to fully and completely perform said contract on his part, and delivered or tendered the personal property to said James S. Marsh and E. C. Marsh and tendered to them a deed properly executed to the lands in Coffee county, Kansas, and leases properly signed to said James S. Marsh and E. C. Marsh of the school lands in Gage county, Nebraska, and that said Wiswell was able by said instruments to properly convey to said James S. Marsh and E. C. Marsh the title to said real estate in Kansas and the leases of said school lands in Gage county, Nebraska, and that said James S. Marsh and E. C. Marsh positively refused to accept said deeds and leases, and positively refused to perform the contract, and it was wholly their fault that said contract was not performed, the court instructs you that said defendant Wiswell was not bound to keep said contract good, and the fact that said Wiswell afterwards used said personal property and disposed of said real property to other persons will not of itself entitle plaintiff to recover against defendants in this action unless you believe from the evidence that said contract was not intended by the parties

to it to be binding upon them until it was reduced to writing, and it never was so reduced to writing."

To the giving of which plaintiff then duly excepted.

As before stated, there being evidence tending to prove a rescission of the contract between Wiswell and the Marshes for the exchange of land and live stock on the part of the former, for the machines and money on the part of the latter, by the taking back and disposing of the land and live stock by Wiswell after the Marshes had failed to pay the money, an instruction stating the supposed facts of the case, and telling the jury that if they believed such facts from the evidence they should find for the defendants, but which instruction ignored and left out the question of rescission and the evidence thereof, is not only logically erroneous but well calculated to mislead the jury, notwithstanding the fact that in other and former instructions the court had properly instructed the jury upon the law of rescission and its application to the case before them.

Instruction No. 4 of the above instructions, given on the part of the defendants, is open to this objection. Whatever may have been the meaning intended by the counsel who drew, or the court which gave, this instruction, I think the jury may have understood and did understand it to mean substantially that whatever might be their belief from the evidence as to the rescission of the contract by Wiswell by resuming the possession and disposing of all the property, real and personal, which was, or was to be, the consideration for the machines in question, nevertheless, if they should find from the evidence that the Marshes did make the contract with the defendant Wiswell substantially as claimed by the defendants, and that the machines in controversy in this action were delivered to Wiswell, or to Harrison as his agent, under and by virtue of said contract and as a part performance thereof, and that said defendant Wiswell was able and ready to perform said contract fully on his part, and only failed to fully and

completely perform it on his part on account of the failure and refusal of the Marshes to perform it on their part, and it was wholly the fault of the Marshes that the contract was not performed by the parties to it, then the plaintiff cannot recover in this action, and they must find for the defendants, etc.

I have given attention to the able argument of counsel for defendants in error to the effect that defendant Wiswell, having tendered the Marshes the deeds and leases to the lands, and having actually delivered to them the articles of personal property, stock, etc., was not required by law to keep such tender good, but, having made other disposition of the land and resumed possession and disposed of the personal property, might still retain the machines. The chief fault of the argument, as well as of the authorities cited in support of it, is, in my opinion, that the law of tender does not apply to the case. The cases cited are mostly applicable to tender in payment of debts, payable in specified chattels at a specified time and place. There had been no credit given in the case at bar. So there was no tender in payment of a debt. If the contract between the Marshes and Wiswell was a completed one, as claimed by the defendants, I think there can be no doubt of the right of Wiswell to retain possession of the leases and of the Kansas land until the Marshes paid the money or gave the bankable note spoken of by the witnesses, or to resume the possession of the personal property on the Giddings place, upon the repudiating of the trade by the Marshes. See *Paul v. Reed*, 52 N. H., 136; *Allen et al. v. Hartfield*, 76 Ill., 358; *Wabash Elevator Co. v. First Nat'l Bank of Toledo*, 23 O. S., 318; *Goldsmith v. Bryant*, 26 Wis., 34, and *Fenelon v. Hogoboom*, 31 Id., 172. But upon making such a disposition of the property as put it out of his power to finally comply with his part of the contract he took upon himself the duty of restoring to the Marshes whatever had passed to him under the contract. See *Eaton v. Redick*,

cited by counsel for plaintiff in error, and cases there cited.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

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JAMES E. BOYD, PLAINTIFF IN ERROR, V. THE STATE  
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Injunction: EFFECT OF THE ORDER.** An order of injunction only restrains the defendant or defendants to the action in which the same is issued, and such persons acting in or occupying a subordinate position to him, or them, as may be named, described, or in some manner designated in such order.
2. **Contempt.** Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein. *Van Zant v. Arg. Mining Co.*, 2 McCrary, 644.

ERROR to the district court for Douglas county. Heard below before NEVILLE, J.

*John D. Howe*, for plaintiff in error.

*William Leese, Attorney General*, for the state.

COBB, J.

The record in this case discloses the following state of facts: The line and track of the Omaha Horse Railroad runs along and through St. Mary's avenue and across Seventeenth street, in the city of Omaha. At the date of the transactions involved in this action, the city of Omaha was

19	128
35	908
19	128
46	12
46	15
46	151
46	604
19	128
54	639
19	128
57	775

engaged in constructing a sewer in and along Seventeenth street and across St. Mary's avenue. This work was being done by contract, McHugh, McGavock & Co. being the contractors with the board of public works of said city for the constructing of said sewer. On or about the first day of November, 1882, William W. Marsh, the sole owner of said Omaha Horse Railroad, filed his petition in the district court of Douglas county against said McHugh, McGavock & Co., alleging, among other things, that said contractors were engaged in the constructing of said sewer in and along said St. Mary's avenue and across Seventeenth street; that he, the said plaintiff, had "lately, in order to prevent the tearing up of his track, and thus preventing the running of cars on said avenue, built a bridge eight feet wide and twenty feet long across said Seventeenth street at its intersection with St. Mary's avenue aforesaid, upon which he has laid his said track and is now running his cars; that said sewer is to cross said avenue directly under the center of said bridge and twenty-one feet under the same; that defendants can, with very little trouble, excavate for said sewer under said bridge, but instead of doing so they propose and threaten to tear up said bridge and said track at the intersection of Seventeenth street and St. Mary's avenue, \* \* \* and so stop the running of cars on said line of street cars, to the great and irreparable injury of the plaintiff," etc., with prayer for "judgment against the defendants, perpetually restraining and enjoining them, and each of them, their agents, servants, laborers, and employes, from tearing up said bridge or track at the intersection of Seventeenth street and St. Mary's avenue, in the city of Omaha aforesaid, or in any manner interfering therewith, and that until the final hearing of this action said defendants, and each of them, their agents, servants, laborers, and employes, and each of them, may, by the temporary order of the court, or judge, be restrained and enjoined from tearing up said street car track

and said bridge on St. Mary's avenue at its intersection with Seventeenth street, in said city of Omaha, and from in any manner interfering therewith," and for general relief, etc.

A temporary injunction, in conformity to the prayer of the said petition, was thereupon granted by the judge of said court; and thereupon a summons was duly issued by the clerk of said court, directed to William McHugh and Alexander McGavock, endorsed "Injunction allowed," and served upon the said defendants.

It further appears that on the 11th day of November, 1882, an order was issued by the judge of said court to James E. Boyd, that he "be and appear before the said court at the court-house in the city of Omaha, on Saturday, December 16, 1882, at 10 o'clock A.M., to show cause why an attachment for contempt should not issue against him for a disobedience of the former order of the court in this cause, granting a provisional injunction." The said order having been duly served, the said James E. Boyd appeared in court on the return day thereof; whereupon a cause was duly entered in said court, entitled "State of Nebraska vs. James E. Boyd," and the following entry made therein: "And now comes the said James E. Boyd, on the return day of the order served on him, to show cause why an attachment should not be issued against him for contempt of the court, alleged to have been committed by him in advising and directing and procuring the violation of the injunction issued in the case of William W. Marsh against William McHugh and Alexander McGavock, and after hearing the said James E. Boyd, as showing cause, and the evidence sustaining said charge against him, it is considered by the court that no cause is shown against the issuing of such attachment, and it is ordered by the court that an attachment be issued against the said James E. Boyd to answer for said contempt."

Said attachment being issued, was, on the 23d day of December, 1882, duly returned by the sheriff of Douglas

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Boyd v. State.

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county, with the said James E. Boyd in custody, before the court, whereupon the following record was made and entered: "Now comes the said James E. Boyd in custody of the sheriff, and was examined under oath touching his alleged contempt; on examination whereof the court do find that he has been guilty of the same, to which finding of the court the defendant excepts. It is therefore considered and adjudged by the court that a fine of two hundred dollars be and hereby is imposed upon the said James E. Boyd," etc. Whereupon the cause was brought to this court on error.

Counsel for plaintiff in error makes several points in his petition in error and in his brief; but it will only be considered necessary to examine one of them:

It appears from the record that at the date of these transactions the plaintiff in error was the mayor of the city of Omaha, and that whatever connection he had with the tearing up of the track of the Omaha Horse Railroad, or the bridge connected with the same, was had and done in his official capacity as such mayor, and not as the agent, servant, laborer, or employe of the said William McHugh and Alexander McGavock, or either of them, and that, in point of fact, he never occupied either of these or any other relation of privity with them or either of them.

Mr. High defines a writ of injunction to be "a judicial process, operating *in personam*, and requiring the person to whom it is directed to do, or to refrain from doing, a particular thing." In this state, the writ of injunction is abolished, and the injunction provided for is declared by statute to be "a command to refrain from a particular act." Comp. Stats., Code, § 250. "It may be the final judgment in an action, or may be allowed as a provisional remedy, and when so allowed it shall be by order." *Id.* In either case, it is a matter personal to the party against whom it is directed and persons occupying a subordinate relation to such party. Neither the judgment nor order of injunction

partake of the nature or character of a proclamation. Indeed, it may be said that, ordinarily, courts have to do officially only with parties to suits and legal proceedings before them, while the executive and legislative departments have official relations with the body of the people.

Where the writ of injunction is used it is usually directed to and against the defendant or defendants, and to their counselors, solicitors, attorneys, agents (and when the thing forbidden to be done is in the nature of labor or mechanical work), laborers, servants, and employes. But under our system, where no writ is used, nor even a formal order necessary, the thing enjoined, or to be refrained from, as well as the person or persons bound by the injunction (and who will be punished in a summary manner for a breach of it), will usually be designated by the allegations of the petition, when the injunction is allowed as a provisional remedy, and by the terms of the judgment itself in other cases. Where the allegations of the petition designate, either by name or description, the persons or class of persons who, in a subordinate capacity, under or in privity with the principal defendant or defendants, are about to do the acts which it is the object or intention of the court or judge to enjoin by a provisional or temporary injunction, the persons so designated, as well as the parties defendant who are served with process in the action, as well as those having knowledge or notice of the allowance of the injunction, are bound by it to the extent of being amenable to summary punishment for violating it.

One case, to which my attention has been called, the second case of *Lord Wellesley v. The Earl of Mornington*, 11 Beav., 181, seems to recognize a power in the court to punish summarily, as for a contempt of court, a person who as the servant of the defendant had cut certain timber, which the defendant was restrained from cutting, and of which the servant had notice, but where the injunction only run against the defendant and not against



his servants, etc., the court were clear as they had already held in the first case between the same parties, *Id.*, 180, and on the same facts, that they could not punish him for a breach of the injunction, but thought they could for contempt. This is the only case which I have been able to find where it has been held, or declared, that a servant, agent, attorney, or employe could be punished for contempt in doing the thing which the master or principal, as a defendant in the suit, was enjoined from doing, when the defendant only was named in the injunction, or where the person punished was shown not to stand in a subordinate relation to the defendant or defendants. *Underwood's Case*, 21 Tenn. R. (2 Humph.), 45, is cited by counsel for defendant in error as a case where a stranger to the suit was held for contempt in disobeying an injunction. But upon examination it will be seen that one question and one only was presented or decided in that case, which was whether in proceedings for contempt in chancery the statement of the defendant made for the purpose of purging his contempt, may be contradicted by opposing affidavits. It was held that it could, but there was no final decision of the case. In the case at bar "William McHugh and Alexander McGavock, their agents, servants, laborers, and employes," were enjoined, and James E. Boyd had actual notice of such injunction. He was mayor of the city, and as such in pursuance of the purposes and policy of the city he gave such directions to the chairman of the board of public works of the city as led to the doing by other servants of the city of the things which McHugh and McGavock and their servants were enjoined from doing. In doing this the mayor may have laid the city liable to the owner of the horse railroad in damages, or he may be personally liable for such damages. But in either event such liability can only be ascertained and damages collected by due course of law.

I shall not quote authorities but cite the following as

bearing on the point involved: *The People v. Compton and others*, 1 Duer (N. Y.), 555 (of op.) *Sage and others v. Quay*, 1 Clarke's Chancery, 242. Rapalje on Contempt, § 47, p. 62. *Batterman v. Finn*, 32 Howard's Pr., 501. *State v. Cutler*, 13 Kan., 131. Joyce on Injunc., vol. 2, p. 1327. *Vanzant v. The Ang. Min. Co.*, 2 McCrary, 643. *Haight v. Lucia and another*, 36 Wis., 355.

A careful consideration of these authorities and others leads me to the conclusion that the district court erred in its judgment that the plaintiff in error was guilty of a contempt of its authority in directing the chairman of the the board of public works of the city to remove the track of the horse railroad for the purpose of proceeding with improvement of the street in question. Had the plaintiff in the original case desired to bind the city and its officers as well as the contractors by his proceedings in injunction he should have made the city a party to this suit. Until that was done it may be doubted whether the mayor was not excusable for looking alone to what he conceived to be the public interest of the city. And a proceeding for contempt in violating an injunction being in its nature criminal, the rules of construction applicable to criminal proceedings must govern it.

The judgment of the district court is reversed and the proceeding dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

AUGUSTUS F. POST, PLAINTIFF IN ERROR, V. SCHOOL  
DISTRICT No. 10, GAGE COUNTY, DEFENDANT IN  
ERROR.

1. **Evidence: LOST PAPERS: SECONDARY EVIDENCE.** Where it is sought to prove by a member of a law firm after its dissolution that he has made search for certain instruments sent to the firm and that he cannot find them, in order to admit secondary evidence of their contents it must be made to appear that he retained the possession of the same, and that search was made in such places as the instruments, if in existence, in all probability would be found.
2. **School District Bonds.** Where the execution and validity of certain school bonds were denied; *Held*, That unless there was some proof of their issue, sale, or ratification by the district, the court should direct a verdict for the defendant.

ERROR to the district court of Gage county. Tried below before BROADY, J.

*S. J. Tuttle*, for plaintiff in error.

*L. W. Colby* and *Hazlett & Bates*, for defendant in error.

MAXWELL, CH. J.

This action was brought in the district court of Gage county upon two instruments purporting to be the bonds of School District No. 10 of that county. The following is a copy of one of the instruments:

"State of Nebraska, county of Gage, School District No. 10, redeemable after one year and payable five years from date, authorized by vote May 11, 1871, total amount of bonds \$2,000. It is hereby certified that School District No. 10 of Gage county, in the State of Nebraska, is indebted to the bearer in the sum of one hundred dollars, redeemable at the pleasure of said district after the 1st day of July, 1872, and payable at the office of the treas-

urer of said district on the 1st day of July, 1876, with interest from the 1st day of July, 1871, inclusive, at 10 per cent per annum, payable on the 1st day of July in each year on the presentation of the proper coupon hereto attached.

This debt is authorized by vote of said district, taken May 11th, 1871, under an act of the state of Nebraska, entitled an act to establish a system of public instruction for the state of Nebraska, approved February 15th, 1869.

No. 18. (Signed) THOMAS M. STERILL, *Moderator*,  
IRA DIXON, *Treasurer*,  
G. T. LOOMIS, *Director*,  
*District Officers, Gage County, Nebraska.*"

The second instrument is numbered 20 and is in substantially the same form as the preceding. To this petition the school district filed an answer in which "it denies each and every allegation in said petition contained, and it denies that said defendant ever voted, made, signed, executed, or delivered said bonds," etc. On the trial of the cause the jury found a verdict for the defendant, and the court dismissed the action. The errors relied upon in this court are the giving and refusing of certain instructions.

The attorneys for the defendant contend that there was not sufficient evidence to entitle the plaintiff to recover and that he was not injured by the instructions given and refused. The bonds sued on were not offered in evidence. It is claimed that they are lost. The proof of loss is as follows: In July, 1876, the plaintiff's attorneys sent the bonds in question to a law firm at Beatrice. This firm seems to have brought an action on said bonds in the county court of Gage county. Afterwards the action was dismissed before judgment, for some cause that does not appear. The law firm was afterwards dissolved, one of the partners remaining and the other removing to another state. The resident partner testified that he supposed they

(the bonds) were in his safe until a short time before the trial; that he did not remember having seen them since 1878. The time when his partner left does not appear, nor is there any proof as to what disposition was made of the business of the firm. This certainly is not sufficient to prove the loss of the instruments. Where a paper is shown to have been in the custody of a certain person or may be presumed to have been in his possession he must in general be called and sworn to account for it if within the reach of the process of the court. 1 Greenleaf Ev., 558. The degree of proof required is merely to establish a reasonable presumption of the loss of the instrument, and that the party has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. 1 Greenleaf Ev., § 558. For aught that appears the original instruments may have been returned to the plaintiff or may be in the possession of the absent attorney.

In *Judson v. Eslava*, Minor (Ala.), 71, an attorney testified that he filed a note among the papers in a cause, and that he had since searched and could not find it; that the last he saw of it it was in the possession of one H. T.; it was held that without some effort made to obtain the testimony of H. T., or some excuse for not having done so, secondary evidence was not admissible.

In the case at bar no doubt there was a sufficient cause for dismissing the action in the county court in 1876. So far as appears there was no necessity for the law firm at Beatrice to retain the possession of the instruments after the dismissal of the action. It is not shown that the member of the firm who testified retained possession of the law office and business of the firm, or that he has had possession of the instruments since the dissolution—in other words, that his office was the proper place to make a search. There was not sufficient proof of loss, therefore, to admit

secondary evidence of the contents of the instruments. Their production seems to have been especially necessary from the fact that their genuineness is denied, and the testimony fails to show that they have been recognized by the district in any manner or form, either by their sale, receipt of the purchase money, levy of a tax for their payment, the payment of any interest thereon, or that the district issued them. Some proof certainly was necessary on some of these points, under the issue made by the pleadings, to entitle the plaintiff to recover. The court would have been justified, therefore, in directing a verdict for the defendant, and there was no question to submit to the jury. The judgment is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	138
23	779
19	138
27	682
19	138
50	558
54	643
19	138
62	185
62	188

**BURLINGTON & MISSOURI RIVER RAILROAD IN NEBRASKA,  
PLAINTIFF IN ERROR, V. MARTHA CROCKETT, AD-  
MINISTRATOR, DEFENDANT IN ERROR.**

- 1. Railroad: LIABILITY FOR INJURY TO EMPLOYEE.** The under boss of a gravel train gang was directed by his immediate superior to take men and dig out a car which had been partly covered and derailed by a fall of gravel from a high bank near by, and in pursuance of such order proceeded to dig out the car, and while so employed was killed by the embankment caving in. Prior to that time the custom had been to station a watchman to give notice to the workmen of danger from the falling bank, which was omitted on that occasion. *Held*, That the company was liable.
- 2. ———: ———.** The conductor of a gravel train on a railroad, with a gang of men under his immediate control, in the employ of the railroad company, is, as to such men, the vice-principal of the railroad company and not a fellow servant.

3. ———: ———. A sub-boss under the immediate control and direction of the conductor or the person in charge of a gravel train is not, as to such conductor or person in charge of the train, a fellow servant.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

*Marquett & Deweese*, for plaintiff in error.

*Sawyer & Snell* and *J. R. Webster*, for defendant in error.

MAXWELL, CH. J.

An opinion was filed in this cause at the last term of the court, judgment being reversed for want of a material allegation in the petition. 17 Neb., 574. Afterwards the parties entered into a stipulation that the petition be amended and the cause again submitted, either party to have leave to file an additional brief. The action is brought by the plaintiff, the mother of Cláybourn Crockett, as administratrix of his estate, to recover damages for his death, caused by the caving of an embankment at a gravel pit where he and others were at work for the railroad company. The plaintiff below (defendant in error) claims to have established two propositions by the evidence, which she alleges are sufficient to sustain the verdict. *First*, That Crockett was under the control of one Wyatt, and was ordered by him to shovel out a certain car near the embankment, which car had been partially covered up and derailed by a fall of earth; and *Second*, That it had been customary to place a watch at or near the bank to give warning when it was apparent that it was about to fall, which precaution was omitted on this occasion.

It is contended on behalf of the plaintiff in error that neither of these propositions is supported by the evidence. This will require an examination of the testimony.

It appears from the testimony that for some months prior to Nov. 18, 1881, when the accident occurred, Clayborn Crockett had been in the employ of the railroad company as under boss of the shovelers of a gravel train, which at the time of the accident was being loaded with gravel at an embankment near Milford to be carried to Lincoln; that an ordinary day's work was sixty cars, which required three trips; that the embankment in question is about a mile and a half east of Milford, and on the south side of the track, and is reached by a spur or side track from the main line, the bank at the highest place being from 20 to 30 feet in height; that on the day the accident occurred a number of the hands were absent—the exact number does not appear, and there seems to have been an attempt on the part of the conductor (Wyatt) to accomplish the usual amount of work; that before noon there was a fall of earth from a high part of the bank, which struck one of the flat cars and partly buried it and threw one end off the track.

The attorney for the plaintiff in error who argued the case insists that there is no evidence to show that Wyatt ordered Crockett to shovel out the car and get it on the track.

One Jerry Wilson testified as follows:

Q. State to the jury, if you know, how Clayborn came to go there to unload that car.

A. It was a custom when we got in a pinch for Mr. Wyatt to help us out.

Q. This Wyatt was in charge of the train?

A. Yes.

Q. And Clayborn had charge of the men?

A. Yes, Mr. Wyatt was a piece off getting a tie to bear the car on the track when it fell.

Q. How far off had he gone?

A. Fifty or a hundred yards. When he started away he said to Clayborn, go in and get that car out as quick as you can; he always said to Clayborn go and do so and so.



One Calvin J. Montgomery testifies: "After that bank had fallen in the morning the same day John Wyatt (six or seven of the cars were loaded) told Clayborn to take those men and go there and clear up the tracks and get the cars ready by the time the Milford train came; Clayton did so and he worked there till dinner; after dinner he came back and he said to go and take some men and go back and clear the tracks; he was digging under the trucks and the bank caught him in this way (witness illustrates the position); the bank was on the south side and the track on the north side; before dinner we did not finish clearing out; after dinner he (Wyatt) told him to take some of the men and clear it and he would go and get a tie; he (Wyatt) went to the tool box and got a tie and had it on his shoulder, and before he got back the accident occurred."

S. Black testified as follows:

Q. What happened to one of the cars that day?

A. The bank had fallen down on it and knocked one and of the car off the track.

Q. What was being done that day?

A. Dug out part of it.

Q. Who dug it out?

A. The men working for Crockett.

Q. How did it come that these men and Crockett were digging it out?

A. Wyatt told them to.

Joseph Carter testified:

"In the forenoon there was a part of the bank fell down and broke the brake, and then we were shoveling that out so that we could get the train out at the usual time."

Q. Who told you to shovel out that car?

A. Wyatt.

Q. Whom did he tell?

A. All of us.

Q. Did he tell any particular person?

A. He told Mr. Crockett.

J. Mitchell testified:

Q. You may tell the jury who were at work there at the car next to the bank where the accident happened at the time?

A. Myself, this Mr. Crockett—he was in the center of the car next to the bank—and there was another man, Robert Reed; we were the only three men engaged in there at that time; the rest of the men were loading up the other cars.

Q. How did you come to load that car?

A. There were four or five more cars below that had been loaded; this car we commenced loading it in the morning; it was very cold that morning; we did not finish loading it, because about eleven o'clock the bank caved in there and had knocked it partially off the track and broke the brake wheel. In the afternoon when the men were called out and had gone to work Mr. Wyatt I believe gave orders to some of them to finish loading the car, and none of them would agree to load it except us two men; they were afraid that the bank would cave again; but myself and another man and Mr. Crockett were at the upper end of the car and Mr. Wyatt was down there, and he left our car and went to Crockett; I don't know what he said; anyhow Crockett came down and pitched in.

\* \* \* \* \*

Deweese: You did not hear what he said to Crockett?

A. No. He came down immediately, and he was engaged in helping us load that car. We had been loading it I believe for three-quarters of an hour before the bank caved in.

Q. The second time?

A. Yes, that was the second time.

Mr. Wyatt, called as a witness by the plaintiff in error, testified on cross-examination as follows:

Q. At the time of this accident where were you when the first fall of dirt occurred on that day?

A. I was about two cars from the men where the dirt fell.

Q. What direction?

A. I was west.

Q. What were you doing?

A. Carrying water around for the men.

Q. Then what did you do when the dirt fell?

A. I don't remember that I did anything in particular. Well, I moved a part of the men from the other side across.

Q. What did you do then?

A. Then told Crockett that we would have to clear the dirt from the car and get it on the track when the engine came.

Q. Did he proceed to clear up the dirt?

A. Crockett and two men.

Q. You said that "we."

A. I meant that the dirt would have to be cleared away.

Q. Did that mean yourself?

A. It did if I had to go there.

Q. Did you go?

A. No, sir.

Q. Did he go?

A. Yes.

Q. Did you tell him to take men?

A. He had the privilege himself to take men.

Q. Did you tell him to go and clear the cars?

A. No, sir.

Q. Was that the manner in which you were accustomed to give your orders there?

A. Not at all times.

Q. But on this day that is the way you spoke?

A. Yes, as a general thing I speak that way, that we would have to do so and so.

He also testifies that the effect was that of a command—to go and do what was required.

There is a great deal of other testimony by the same witnesses tending to show that just before the accident Wyatt directed Crockett to clear the dirt away from around the car which had been derailed, and that while thus engaged the bank caved and fell on him, causing his death.

The objection that the testimony is not sufficient on that point to warrant the verdict is not sustained. 2d. That the testimony fails to show that it had been customary to keep a watchman to notify the shovelers that the bank was about to fall, and at the time of the accident this precaution had been omitted.

Joseph Carter testifies on that point as follows:

Q. State to the jury what had been the custom of the company about protecting the employes from danger resulting from caving in, if anything?

A. Always up to that time there was some one on the bank watching and seeing if there was any danger; and if there was any danger there was always notice given, so we got out of the way in time and none were hurt.

Q. Who would station them up there?

A. Mr. Wyatt.

Q. Had anybody been stationed up there to watch and give warning this day of the accident?

A. No, sir, nobody was there that day at all.

In this the witness is corroborated by nearly all the others.

Mr. Wyatt testifies on cross-examination as follows:

Q. That was your custom, to go along there and when it became dangerous to tumble the bank down?

A. When we got through the gravel we threw the bank. If we thought there was danger we would throw the bank.

Q. You would in both cases?

A. Yes.

Q. Would you have men stationed up there on the bank if it was dangerous?

A. Not on the top of the bank.

Q. Anywhere else?

A. On the top of the cars.

Q. Did you ever perform that duty?

A. I have.

Q. And you would undertake to give warning to the men if there was danger?

A. Yes.

Q. You would take a position on the cars, and if you saw any cracks you would tell the boys to get out?

A. If I saw any move in the bank, yes, sir.

Q. On this day you were not watching the bank?

A. Was not at the time the bank fell, or had not been that day.

There is no proof whatever that Crockett knew that there was no one watching the bank. The position was a dangerous one, and this seems to have been known to Crockett, but with a watchman to give warning that the bank was about to fall, one of the witnesses testifies that the shovelers could get upon the flat cars and escape injury. Had the usual watch been kept, this accident probably would not have occurred. There is sufficient proof of negligence, therefore, to sustain the verdict. But it is said that Crockett was a fellow servant with Wyatt, and that the servant assumes all the risk of danger that is apparent.

This question was before this court in *C., St. P., M. & O. R. R. Co. v. Lundstrom*, 16 Neb., 254. In that case it was held that a conductor of a construction train on a railroad, with a gang of men engaged to work as day laborers for the railroad company, but under the immediate orders of such conductor, is as to such men the vice principal of the railroad company, and not a fellow servant of such men. And an act of gross negligence on the part of such conductor, whereby the lives of such men were placed

in jeopardy while working under his immediate orders and direction, and one of them was killed, was the negligence of the company, for which it was liable. That case was ably argued, and the attorneys in the case furnished elaborate briefs, which contained references to the leading authorities up to that time, and the decision was not reached until the authorities pro and con had been carefully considered; and now, after the lapse of one and a half years, we see no reason to change our decision. That decision, therefore, will be adhered to, and it is decisive of this case. Here, Crockett, although an under boss of the hands, was under the immediate direction of Wyatt, who was the responsible head and represented the company. So far as the necessity of obeying Wyatt was concerned Crockett seems to have been in precisely the same condition as any of the other workmen. To all intents and purposes he was one of them. The testimony tends to show that Crockett was an intelligent colored man, about twenty-four years of age; that he was sober, industrious, and, so far as appears, a man of good character in all respects; that the plaintiff was largely dependent upon him for support, and that he was in the habit of remitting to her from \$15 to \$25 each month from his wages. The verdict was for \$925, a sum that would seem to be much less than the plaintiff's damages; but as no complaint is made on that ground it cannot be considered here. Upon the whole case we find no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

J. H. McMURTRY AND JOHN S. GREGORY, PLAINTIFFS  
IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT  
IN ERROR.

19	147
20	324
19	147
29	323
19	147
30	567
19	147
41	832

1. **Bill of Exceptions.** Affidavits used in the trial court to be available for a review of the question in the supreme court must be embodied in a bill of exceptions.
2. **Default: JUDGMENT.** Where an answer or other pleading of a defendant is properly on file no judgment by default can be entered against him.
3. **Answer: AMENDMENT.** An answer filed in the district court, but entitled "in the county court," is amendable, and if applicable to the petition cannot be disregarded.

ERROR to the district court for Lancaster county. Tried below before POUND and MITCHELL, JJ.

*John S. Gregory*, for plaintiffs in error.

*William Leese*, Attorney General, for the state.

MAXWELL, CH. J.

This action was brought on behalf of the state to recover from McMurtry and Gregory the sum of \$300 and interest upon a contract entered into by them with the board of public lands and buildings, "whereby it was agreed that for and in consideration of the title and ownership of all the material then in said capitol building to be transferred by this plaintiff to said defendant Gregory the said Gregory agreed to take down and remove all the material in said capitol building at his own expense and pay the plaintiff (below), the state of Nebraska, within 60 days from the 5th day of June, 1883, the sum of \$300."

A copy of the contract is set out in the petition. It is also alleged that McMurtry and Gregory signed a bond in penal the sum of \$15,000, conditioned that said Gregory

should faithfully perform the conditions of said contract, and that he has failed to pay said sum of \$300, etc.

To this petition McMurtry and Gregory filed separate answers. On the trial of the cause in the county court judgment was rendered in favor of the state. McMurtry and Gregory then appealed to the district court. They thereupon filed an answer on which is the following indorsement:

"The State of Nebraska vs. John S. Gregory *et al.* County Court, files —. Clerk's office, district court. Filed Oct. 13, 1884. E. R. Sizer, Clerk D. C."

On the 27th of February, 1885. while the answer above referred to was on file, the court entered judgment by default in favor of the state for the sum of \$331.50. Afterwards, on March 2d, the defendants below filed a motion to set aside the default and for leave to answer. This motion was supported by the affidavit of John S. Gregory, and was opposed by that of N. C. Abbott. The motion was overruled.

The affidavits referred to are in the record, but are not embodied in a bill of exceptions, and a motion is now made to strike them from the files on that ground. The motion must be sustained. The rule is that affidavits used in the trial court to be available in the supreme court must be preserved in a bill of exceptions. *Ray v. Mason*, 6 Neb., 102. *Credit Foncier v. Rogers*, 8 Id., 36. *Aultman v. Howe*, 10 Id., 10. *Oliver v. Sheeley*, 11 Id., 522. *Dorrington v. Minnick*, 15 Id., 398. *Dolen v. State*, 15 Id., 405. *Empkie v. McLean*, 15 Id., 629.

The court, however, had no authority to render judgment by default while there was an answer of the defendants below on file. A party who has answered, unless out of time and without leave, is not in default. The fact that the answer was entitled in the county court, where it was apparent that it was intended to answer the cause of action set up in the petition did not authorize the court to disre-



gard it. The title was amendable. So long as an answer or other pleading of a defendant is properly on file no judgment by default can properly be entered against him. To authorize a default the answer or other pleading must be disposed of by motion, demurrer, or in some other manner. The court therefore erred in rendering judgment by default against the plaintiffs in error while their answer was, so far as appears, properly on file. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THE other judges concur.

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STATE OF NEBRASKA, EX REL. OMAHA HORSE RAILWAY  
COMPANY V. THE JUDGES OF THE DISTRICT COURT  
IN AND FOR DOUGLAS COUNTY.

19	149
19	449
19	149
46	88
19	149
48	762
19	149
51	667

**Mandamus:** SUPERSEDEAS BOND. Where a peremptory writ of mandamus was granted by the district court against a street railway company to compel it to run cars over a certain portion of its line, and the railway company sought to have the judgment reviewed in the supreme court and to compel the district court to fix the amount of the supersedeas bond; *Held*, That there was no provision of the statute requiring such court or judges to fix the amount of the undertaking in such case.

ORIGINAL application for mandamus.

*George E. Pritchett*, for relator.

*John L. Webster*, for respondents.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus to compel the judges of the district court of Doug-

las county to fix the amount of the supersedeas bond to be given by the relator in order that a certain judgment compelling it to run its cars over a certain portion of its line may be stayed until it can be reviewed in the supreme court.

It is alleged in the affidavit on which the application is made, "that said court refused, and still refuses, to fix the amount in which a supersedeas bond should be given by said respondent in said proceedings, or the form thereof, and refused, and still refuses, to permit said respondent to supersede said writ and judgment upon proceedings in error to the supreme court to review the same, giving as the only ground for such refusal that the law does not provide for a supersedeas upon error to the supreme court in mandamus cases."

The attorney for the respondents has filed an affidavit wherein he alleges that the respondents refused to fix a supersedeas bond, for the reason that the Omaha Horse Railway Co. were not entitled to supersede the judgment and final order in said cause, and that there was no law requiring them to fix the amount of a supersedeas bond in said cause; and that said refusal was not made on the sole ground that there was no law providing for supersedeas bonds in mandamus cases in general

Sec. 588 of the code provides for a supersedeas—1st, When the judgment or final order sought to be reversed directs the payment of money, in which case the undertaking is required to be in double the amount of the judgment or order; 2d, When it directs the execution of a conveyance or other instrument the court or judge is required to fix the amount of the undertaking; 3d, When the judgment or final order directs the sale or delivery of real property, the court or judge is required to fix the amount of the undertaking

There are other provisions to which it is unnecessary to refer.

Sec. 582 provides that "a judgment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court for errors appearing on the record." This would seem to include a final judgment awarding a peremptory writ of mandamus, and no doubt it does; but the provisions for a supersedeas are not as broad as those for the review of judgments on error. No doubt the district court, in the exercise of its equity powers, may, in a case not provided for in the statute, where great hardship or wrong would be the result of enforcing the judgment or final order before the cause was reviewed in the court of last resort, fix the amount of the undertaking and cause a stay of proceedings. But that question is not before the court

The relator seeks to compel the defendants to fix the amount of the undertaking because the statute makes it their duty to do so, and it has a right to enforce the performance of that duty. The final judgment was that the relator should run cars over a certain portion of its road. The right to review such a judgment on error is undoubted, but the authority of the judges to fix the amount of supersedeas to stay the judgment in such a case is not conferred by statute. The writer has spent considerable time in the examination of authorities, but has been unable to find a single case where the question involved was similar to that under consideration in which a supersedeas was granted.

In *People v. Throop*, 12 Wend., 183, the cashier of a bank refused to permit a director, who it was claimed was hostile to the bank, to inspect the discount book, and the board of directors afterwards passed a resolution excluding such director from such inspection. The court, upon the return to a rule to show cause, granted a peremptory writ of mandamus to compel the cashier to permit an inspection of the book, but no stay of proceedings seems to have been granted

In *People v. Steele*, 1 Edmund's Select Cases, 505, it was

held that the writ of error did not operate as a stay of execution, and the same rule seems to prevail in South Carolina. *Pinckney v. Henegan*, 2 Strob., 250. High Ex. Rem., § 557. Indeed, in many cases where there is a refusal to perform a plain public duty, as to permit an inspection of books, operate a railway, etc., the judgment should not be stayed for the reason stated in *People v. Throop* (page 188). "A delay might render nugatory the whole proceeding as to the relator." As the statute does not require the defendants to perform the duty sought to be enforced, the writ must be denied.

WRIT DENIED.

THE other judges concur.

19 152  
33 789

MEYER HELLMAN ET AL., PLAINTIFFS IN ERROR, V.  
BENJAMIN SPIELMAN, DEFENDANT IN ERROR.

1. **Amercement.** In all proceedings against sheriffs or other officers for failure to return writs of execution, etc., the inquiry is permitted whether the debt could have been collected, and whether its collection has been prejudiced by the acts of the defendant. *Crooker v. Melick*, 18 Neb., 227.
2. ———: **DAMAGES.** In such cases the actual loss sustained by the plaintiff in the value or availability of his security by reason of the act or negligence of the defendant is the measure of his damages.

ERROR to the district court for Platte county. Tried below before NORVAL, J.

*McAllister Brothers*, for plaintiffs in error, cited: *Conkling v. Parker*, 10 Ohio State, 29. *Smith v. Martin*, 20 Kan., 575.

*M. Whitmoyer and G. G. Bowman*, for defendant in error, cited: *Webb v. Anspach*, 3 Ohio State, 522.

COBB, J.

This cause arises upon a motion by the plaintiffs in error made in the court below, on notice to the defendant, an ex-sheriff of Platte county, to amerce him for failing to return a writ of execution issued by the clerk of the district court of said county, and directed and delivered to the said defendant while acting as such sheriff.

No answer or pleading of any kind was made or filed by the defendant. The matter was tried to the court, which found that said motion should not be sustained, and that said sheriff is not liable to amercement; and adjudged that said motion be overruled, and said cause dismissed at the cost of said plaintiffs, etc. The plaintiffs bring the cause to this court on error.

There is but one error assigned, to-wit: "That the finding and judgment of said court is against the evidence and law of the case."

It appears from the evidence as preserved in the bill of exceptions that the execution, the alleged failure to return which constituted plaintiffs' cause of action, was issued on the 17th day of June, 1881, and was returned to the clerk's office on the 21st day of January, 1882. This evidence is not very satisfactory; the execution seems to have been lost; and the return was not transcribed into the execution docket; but something was pasted in the docket which it seems indicated the date of the return as above. The clerk testified that the reason why he did not enter the return in the docket was that it was too large; and the reason why he did not enter the date at the time was that the execution was lost.

It also appears that the execution above referred to was issued against the property of E. A. Baker and H. P. Ba-

ker, upon a judgment then lately obtained against them in the district court of Platte county, in favor of Meyer Hellman and Aaron Cohn; also that on the 23d day of July, 1881, Alta A. Baker commenced an action in said court against Benjamin Spielman, sheriff, Meyer Hellman, and Aaron Cohn; and in her petition, among other things, alleged that the said Meyer Hellman and Aaron Cohn had, on, etc., recovered a judgment against H. P. Baker and Eunice A. Baker, in the district court of Platte county, for the sum of \$443.28, together with costs taxed at \$11.98; and had, on or about the 17th day of June, 1881, caused an execution to issue upon said judgment, and placed the same in the hands of Benjamin Spielman, sheriff of Platte county, who, on or about the 22d day of June, 1881, levied the same on certain real estate which she, said Alta A. Baker, claimed as absolute owner; and prayed an injunction to restrain the said sheriff from selling the same. It further appears that a temporary injunction was issued in said cause, and served on the said sheriff; and that the said cause was afterwards tried in said court, and the said injunction made perpetual. It also appears from the deposition of the said sheriff that he was unable, after thorough search and with due diligence, to find any other property of the said H. P. Baker and Eunice Baker, or of either of them, beside the said real estate the sale of which was enjoined as aforesaid, within his county whereon to levy; and neither of them had any such property to the best of his knowledge. Also, that upon being served with said injunction as aforesaid, and before the return day of said execution, he made his return on the said execution to the effect that he had made a levy on certain real estate which, at the time and place of making his said deposition, he could not describe; that he was enjoined by the court from selling the same; and that he left said execution in the office of the clerk of the court.

There was, therefore, evidence before the trial court from

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 Suydam v. Merrick County.
 

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which it may have found that the execution was returned in due time, or that the injunction placed it out of the power of said sheriff, or of the said Hellman and Cohn, to collect the money called for by said execution, or any part thereof, from the defendants therein.

The case of *Crooker v. Melick*, 18 Neb., 227, presented the question whether, in a proceeding to amerce a sheriff for failing to return an execution according to the command thereof, he could successfully defend by alleging and proving that the execution debtor had no property or effects out of which the execution or any part of it could have been collected. After a thorough examination and discussion of the question, we came to the conclusion that he could, and so decided that case. Since the presentation of this case we have carefully gone over the ground again, but fail to find any good reason to change the views there expressed. The judgment of the district court is therefore affirmed.

AFFIRMED.

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19	155
20	608
19	155
26	704
19	155
31	373

GEO. V. SUYDAM, PLAINTIFF IN ERROR, V. THE COUNTY  
OF MERRICK ET AL., DEFENDANTS IN ERROR.

1. **Taxes: BOARD OF EQUALIZATION.** The county commissioners sitting as a board of equalization have the power to increase, or diminish, the aggregate valuation of any precinct, by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of property in the county; and for such purpose, it is not necessary that complaint should be made or notice served.
2. ———: ———: **INCREASE OF VALUATION.** But such board has not the power to increase the aggregate valuation of all the precincts, except in such an amount as may be actually necessary, and incidental to a proper and just equalization.
3. ———: ———: ———. An increase of \$114,382.43 in an ag-

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Suydam v. Merrick County.

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gregate valuation of \$1,296,419.10 is a greater increase than can be deemed "actually necessary and incidental to a proper and just equalization."

ERROR to the district court for Merrick county. Tried before POST, J.

*A. Ewing*, for plaintiff in error.

*John Patterson*, for defendant in error.

COBB, J.

This action was brought by Geo. V. Suydam, a tax payer of Loup precinct, Merrick county, Nebraska, for himself as well as for all others, the tax payers of said precinct contributing to the expense of the action (over eighty persons), to have reviewed by petition in error the action of the board of county commissioners of said county, whilst sitting as a board of equalization of taxes for the year 1885, in increasing the aggregate valuation of the property of all the precincts of said county, as made and returned by the assessors thereof; said valuation as made by the assessors being \$1,296,419.10. The said board, while so sitting, increased said valuation in the sum of \$114,382.-43, about 9½ per cent. Of this increased valuation on all the property of said county as returned by the assessors, \$53,544.70 was made upon said Loup precinct. Said increased valuation was made arbitrarily and without notice to the owners thereof, and without having evidence before them upon which to base their said action, being merely voted upon by them upon motion. At the trial of said cause in said district court, judgment was had finding no error in said proceedings of said board of equalization, and dismissing said petition in error, etc.

The said plaintiff in error brings the cause to this court on error, and assigns the following errors to the said district court :



"1. The court erred in not sustaining each and every point in plaintiff in error's petition in error as follows, to-wit:

"*First.* Said board of county commissioners has not and had not any power in law to increase as they did the aggregate of valuations of the property of all the precincts of said county as returned by the assessors thereof in the sum of \$114,382.43.

"*Second.* Said board of county commissioners has not and had not any power in law to increase the valuation of said Loup precinct without giving notice to the owners thereof, by a mere arbitrary exercise of power, without having any lawful evidence before them upon which to base their said action.

"2. The court erred in affirming the judgment and proceedings of said board of county commissioners, and in dismissing said petition in error, and in giving judgment for costs against plaintiff in error and in awarding execution to carry into effect said judgment.

"3. The court erred in not sustaining the errors alleged by plaintiff in error to the proceedings of said board.

"4. The court erred in refusing to reverse, vacate, and set aside the judgment of said board of county commissioners in changing and increasing the valuation of Loup precinct and increasing the aggregate of the valuation of the property of all the precincts of said county as returned by the assessors thereof, as prayed for in said petition in error."

The two substantial errors above assigned will be considered in the inverse order in which they are presented.

"Second. Said board of county commissioners has not and had not power," etc. The following is a copy of the section of statute under which the board of county commissioners acted in the proceedings complained of: "The county board shall hold a session of not less than three nor more than twenty days, for the purpose contemplated in this section, commencing on the first Tuesday in June annually, after the return of the assessment books, and shall, *First,*

Assess all such lands as have been listed by the county clerk, and not assessed by the assessor. Said board may make such alterations in the descriptions, if it shall be deemed necessary. *Second*, On the application of any person considering himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just. No complaint that another is assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county; *Provided*, that in the counties under township organization, that such application shall have been made to the town board of equalization and been rejected by them. *Third*, It shall ascertain whether the valuation of one township, precinct, or district bears just relation to all the townships, precincts, or districts in the county; and may increase or diminish the aggregate valuation of property in any township, precinct, or district by adding or deducting such sum upon the hundred as may be necessary to produce a just relation between all the valuations of property in the county, but shall in no instance reduce the aggregate valuation of all the townships, precincts, or districts below the aggregate valuation thereof as made by the assessors; neither shall it increase the aggregate valuations of all the townships, precincts, or districts, except in such an amount as may be actually necessary and incidental to a proper and just equalization," etc. Comp. Stat., Ch. 77, § 70.

It is difficult to conceive how there can be any two constructions placed upon this section. When complaint is made that a certain individual is assessed too low, then it is a condition precedent to action thereon by the board, that such individual owner have notice of such proceeding. But the increase of the assessment of a precinct is not made upon any one's complaint, but arises in the official mind and judgment of the commissioners, upon an inspection and comparison of the assessment rolls of the several pre-

cincts. The law has designated no officer or person upon whom notice could be served or to represent the precinct at such equalization. The county commissioners themselves are the only and proper representatives of the precinct, and as they constitute the board of equalization no notice need be served on them. Again, the language of the section expressly requiring notice in the one case and no mention being made of it in the other, it falls within the legal maxim "*Expressio unius est exclusio alterius.*"

The section of statute above quoted was not in force at the date of the opinion in the case of *The South Platte Land Co. v. Buffalo Co.*, 7 Neb., 253, nor *Dundy v. Richardson Co.*, 8 Neb., 508, hence those cases are not authority on the question here presented.

I think it equally clear that in equalizing the assessment as between the several precincts of the county, under the provisions of the section above quoted, the board acts upon the knowledge and judgment of its own members, and not upon the testimony of witnesses. The commissioners usually are, and always should be, selected for their thorough knowledge of the county, as well as for their general intelligence and probity. They are selected from the center and two extremes of the county, presumably for some reason, and I know of none other than to secure in the board one member of peculiar knowledge of and acquaintance with the affairs of each locality of the county. It must, therefore, usually be unnecessary for the board to call witnesses to inform it of the relative values of property in the several precincts of the county, but to permit them to do so would tend to a shirking of responsibility on their part unauthorized by law, and likely to be subversive of good local government.

Upon the first point, that the board had no power to increase the aggregate assessed value of the county, etc., I think the language and meaning of the section equally clear. The duty of the board is to equalize. It has no

power to raise the valuation of the one precinct and lower that of another, except for the purpose and the sole purpose of bringing their valuation to a common point of equality. When a county is divided into several towns or precincts, as in the case at bar, and the assessment is made in each by an independent assessor, it is usually the case that some one or more of them rate the property assessed at a maximum valuation, some at a minimum, while some individual or group of assessors will find the happy medium or true valuation. It is the duty of the board to find this medium, adopt it as the true standard, and raise the one extreme and lower the other to it, and thus leave the general result or common aggregate of valuation of the property of the whole county neither raised nor lowered, "except in such an amount as may be actually necessary and incidental to a proper and just equalization."

It appears from the record that Merrick county, in which the case at bar arose, is divided into thirty-five precincts. At the equalization now under consideration the assessment in none of them was deemed the medium, but all were either raised or lowered. The valuation of eleven of them was lowered \$51,569.50, and of the other twenty-four was raised \$165,951.93, leaving an increase or raise of the aggregate valuation of the county of \$114,382.43. Now can it be said that such an increase as this was actually necessary, and incidental to a proper and just equalization? I think not, but that in making it the board exceeded its powers as plainly defined by statute.

I conclude, therefore, that the district court erred in upholding the action of the board of equalization.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE, EX REL. HENRY G. MECKLING, VS. HENRY  
C. JAYNES.

1. **Mandamus: JUSTICE OF PEACE: PLEADING.** Upon an application for a mandamus by a person who has duly received a certificate of election to the office of justice of the peace to compel the delivery to him by the late incumbent of said office of the dockets and papers appertaining thereto, the cause of action necessary and proper to be set out in such application consists solely in his having been canvassed in, declared elected, awarded a certificate of election, taken the oath, and given the bond required by law, and the respondent having refused or failed to deliver up to him such dockets, papers, etc., on demand.
2. ———: ———: **ANSWER.** To such application or relation nothing may be properly pleaded in answer which does not deny or put in issue some or all of the above facts.

ORIGINAL application for mandamus.

*T. D. Cobbey*, for relator.

*P. E. Winters* and *E. N. Kauffman*, for respondent.

COBB, J.

This case arises upon the application of H. G. Meckling, relator, for a peremptory mandamus against H. C. Jaynes, respondent, commanding him to turn over and deliver to the said relator all the books and papers pertaining and belonging to the office of the justice of the peace of the precinct of Wymore, Gage county.

The relator sets out in his relation, or petition, that on the 3d day of November, 1885, he was, and is, a resident of Wymore precinct, Gage county, and was on the day last above stated elected to the office of justice of the peace in and for said precinct; that at the general election held on said day, there were two justices of the peace to elect in

19	161
19	447
19	697
21	222
19	161
36	404
19	161
46	736
19	161
49	758
55	703
19	161
62	779

and for said precinct, and were four candidates therefor, that at the general election held in and for said precinct in the year 1883, H. C. Jaynes (respondent) and C. A. Burnham were elected justices of the peace in and for said precinct; that they each qualified and have since said date been the acting justices of the peace in said precinct; that at the election held in and for said precinct on the 3d day of November, 1885, of the said four candidates for said offices, said

C. A. Burnham received 204 votes,

The relator received 196 votes,

Jesse Cochran received 180 votes,

And the respondent received 161 votes,

according to the canvass of said votes by the county board, and that certificates of election were duly issued and delivered to the said C. A. Burnham and to the relator; that relator has made and executed his bond, which has been duly approved, and has taken the oath of office as provided by law, and that on the 7th day of January, 1886, the relator demanded of the said H. C. Jaynes, whom he was elected to succeed, all of the books and papers belonging and pertaining to said office, and that the same was refused, etc.

The respondent, by his answer, alleges that he is an elector of the city of Wymore, which is and has been since the 1st day of April, 1884, a city of the second class, formed under the general laws of the state; that at a general election held in and for said town of Wymore on the 3d day of November, 1883, the respondent and C. A. Burnham were duly elected justices of the peace, in and for said town of Wymore, to hold their respective offices for the term of two years and until their successors were duly elected and qualified; that each of the last above named persons, at the time of said election, was a legal and qualified elector and a resident of the said town of Wymore, and each of said persons accepted said office and qualified, and entered upon

the exercise and discharge of the duties of said offices; that at the general election of justices of the peace and other officers in said city held in accordance with the provisions of law (Nov. 8, 1885), said C. A. Burnham was re-elected to his office, and that the relator herein claims to have been a resident of said city, and to have been elected to said office of justice of the peace heretofore and now held by the respondent, but that said relator did not receive a plurality of the legal votes cast at said election, and was not elected to said office; yet the board of canvassers, the judges of election, issued a certificate of election to him, certifying that he was elected thereto. That the respondent contests the said alleged election of said H. G. Meckling, relator, to said office, upon the grounds as follows, to-wit, that the said H. G. Meckling was not, at the date of said election, a resident and qualified elector of said precinct, but on the contrary was at the date aforesaid living in Barnstowm precinct; that of the 196 votes cast at said election, and counted for said relator, a large number, to-wit, 40 votes, were illegally printed, distributed, cast, and counted, contrary to chapter 43 of the Session Laws of 1883, entitled "An act to prevent fraud at elections and to provide punishment therefor," Comp. Stat., ch. 26, sec. 115, in that the said ballots were headed and designated by the heading "Republican ticket," but contained printed thereon in place of the name of H. C. Jaynes, respondent, whose name is printed on the regular ballot having such heading, the name of H. G. Meckling, relator, whose name is not found on the regular ballot bearing such heading; that without the aid of said illegal votes, the said H. G. Meckling would not have a plurality of the total number of votes cast at said election for said office of justice of the peace, etc.

To this answer the relator filed a general demurrer, upon which the cause was submitted.

At the hearing, and upon a superficial discussion of the case in the consultation room, the writer was inclined to

think that to issue a mandamus on the case made, would be to enforce the perpetuation of a confessed fraud on the law; but upon more mature reflection, and an examination of cases cited by counsel and others, I am satisfied that it would involve no such absurdity.

A demurrer admits the truth of such facts as are properly pleaded in the pleading demurred to, and such only. The allegations of the said answer, that the relator was not at the date of said election a resident and qualified elector of the city of Wymore, that he was not at said election elected to the office of justice of the peace, and that of the 196 votes cast at said election and counted for said relator, a large number, to-wit, forty votes, were illegally printed, distributed, cast, and counted, contrary to the provisions of the statute therein referred to, and that without the aid of said illegal votes the said relator would not have a plurality of the total number of votes cast at said election, were none of them well pleaded in the said answer; nor did they or any of them constitute a defense to the relator's cause of action. The relator's cause of action consists solely in his having been canvassed in, declared elected, awarded a certificate of election, taken the oath, and given the bond required by law, and the respondent having refused or failed to deliver up to him the books, papers, and furniture of the office, on demand. It was quite unnecessary for him to have alleged any other facts than these in his relation, nor would the denial and disproving of any other facts by the respondent defeat the action. It is stated as the law, in a standard work on this branch of the law, as follows: "Upon the application for a mandamus, the court will not go behind the certificate of election and try the relator's actual title. It is, therefore, wholly immaterial whether the relator was eligible to the office in question, or whether he was duly elected thereto, since to try such issues would be to determine the title upon proceedings in mandamus, which the courts will never do." High on Ex. Leg. Rem., 74-5; and this is the law of the courts generally.



Vanderlip v. Derby.

The remedy by contest or that by *quo warranto* are neither considered adequate, for the reason that they are both directed to the title to the office itself, and in the nature of things usually consume considerable time, while the purpose of this proceeding is only for the present.

A peremptory mandamus will therefore issue as prayed.

WRIT AWARDED.

THE other judges concur.

J. E. VANDERLIP ET AL., PLAINTIFFS IN ERROR, V.  
LOUIS P. DERBY ET AL., DEFENDANTS IN ERROR.

1. **Liquors: CONSTRUCTION OF STATUTE.** The provisions of section 3, chapter 50, of the Compiled Statutes of 1885, by which it is provided that upon an objection, protest, or remonstrance being filed against the issuance of a license to sell intoxicating liquors, the county board, city council, or village trustees shall appoint a day for hearing the case, is mandatory, and the board, council, or trustees have no authority to issue a license without appointing a time for hearing a remonstrance filed and investigating the same.
2. ———: **PRACTICE IN ISSUANCE OF LICENSE.** Where a petition is filed asking a board having authority to issue a license to sell malt, spirituous, and vinous liquors, and a remonstrance is filed in opposition thereto, in which it is charged that during the year last passed the petitioner had violated certain provisions of chapter fifty of the Compiled Statutes of 1885, the board has no right to issue the license but must appoint a time for hearing the remonstrance if the allegations are sufficiently specific.
3. ———: **REMONSTRANCE AGAINST LICENSE.** The village clerk is the clerk of the board of village trustees. A remonstrance filed in the office of such clerk is "filed in the office where the application is made," and is sufficient.
4. ———: ———: **TIME OF FILING REMONSTRANCE.** Where an application is made to a board for license to sell intoxicating liquors and notice thereof duly given, remonstrances and objec-

19	165
20	472
24	612
19	163
25	609
25	734
19	165
37	363
19	165
42	484
42	756

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Vanderlip v. Derby.

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tions to the issuance of the license may be filed at any time before the license is granted. The time for the filing of remonstrances is not limited to within two weeks after the filing of the application for license.

ERROR to the district court for Lancaster county. Tried below before POUND and MITCHELL, J.J.

*Caldwell & Christy* and *L. W. Billingsley*, for plaintiffs in error.

*L. C. Humphrey* and *H. D. Rhea*, for defendants in error.

REESE, J.

This is a proceeding in error to the district court of Lancaster county for the purpose of a review of a final judgment in that court, by which a peremptory writ of mandamus was awarded against plaintiffs in error.

The abstracts of the record disclose the following facts, to-wit: Plaintiffs in error are the board of trustees of the village of Bennett. On the 8th day of May, 1885, George Brown applied to the trustees for a grant of license to sell liquors. Due notice of this application was given by publication as required by law. On the 22d of May, and before a meeting of the village board, a remonstrance against, and objections to the issuance of a license was filed with the village clerk. This remonstrance alleged that George Brown, the applicant, had violated the act of the legislature under which he was applying for a license, denied that he was a man of respectable character and standing, or that he had filed his petition as required by law, and alleged that during the year last past he had violated said act by selling liquor to habitual drunkards, minors, and upon Sunday, and asked an adjournment to a day when they would make their charges more definite. At the first meeting of the board thereafter, and before any action was taken upon the matter of the application and remonstrance, the

remoustrants appeared and presented an additional remonstrance, by which it was charged that the applicant sold intoxicating liquors during the month of October, 1884, on Sunday, that George Brown was a partner of his brother John, who had recently been defeated before the same tribunal in an effort to procure a license in Bennett, he having been proven to be an unfit person, and that the effort to procure a license in the name of George was a fraudulent device, the purpose of which was to continue John in the saloon business in Bennett. No time was fixed for hearing the petition and remonstrances, but the license was issued at once. Defendants in error instituted these proceedings in the district court with the result above stated.

The arguments of counsel on both sides have taken a wide range, and have discussed many questions which are quite interesting, and may eventually require a solution. But as they are not essential to the decision of this case, and the time at our command is limited, we will not pursue them.

It is asserted that the objection contained in the first remonstrance, which is, in substance, a denial of the filing of such a petition as is required by law by the applicant, is based upon the fact that two of the board of trustees by whom the petition was to be heard, and who were required to pass upon it, both as to its sufficiency and as to the merits of the case, were signers of the petition. It is shown that two of the board opposed the issuance of the license until a proper examination could be made, and voted against its allowance, three voting in favor of the allowance and against the extension of time. If the charge is true that two of the members signed the petition to themselves, and they were of the three who voted for the granting of the license, we have this unusual condition of a license being issued by the vote of *one* disinterested man over the opposite vote of two, for no one could claim that the two who signed the petition were disinterested. It is to be hoped

that the charge here made is a mistake. The fact that an official oath sits so lightly upon the conscience of any officer as to permit him thus to become a partisan in a proceeding before himself, is not to be believed except upon the most indubitable proof.

The controlling question here presented is, did the original or first remonstrance contain enough to require the board to fix a time for its hearing? We think it did. It is quite probable that, under the rule laid down in *State v. The Commissioners of Cass County*, 12 Neb., 54, the mere denial of the "respectable character and standing" of the applicant would be sufficient. But however that might be, it is clear that the affirmative allegation that, during the year last past, he had violated the provisions of the liquor law of the state by selling liquor to habitual drunkards, minors, and upon Sunday, would be sufficient to demand the hearing contemplated by section three of the law regulating the sale of liquors. This section is as follows: "If there be any objection, protest, or remonstrance filed in the office where the application is made against the issuance of said license, the county (village or city) board shall appoint a day for hearing of said case, and if it shall be satisfactorily proven that the applicant for license has been guilty of the violation of any of the provisions of this act within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of this state, then the board shall refuse to issue such license." Chap. 50, Comp. Stats., § 3.

The important question for the board to decide is, whether or not the applicant is a suitable person to receive the trust which it is proposed to confer upon him. A liberal construction should be given to the law requiring the hearing, and a reasonable latitude to such hearing, in order that "the whole truth" may be known.

It is said, though not insisted upon, that the remonstrance should have been filed with the board, and not with

the village clerk. The village clerk is the clerk of the board. The filing of the remonstrance with him was sufficient.

Under the rule laid down in *State, ex rel., v. Reynolds*, 18 Neb., 481, it was clearly the duty of the board to appoint a day for hearing the case, and the decision of the district court in awarding the writ was correct. But had the first remonstrance been insufficient, the second one was full and specific, and had the majority of the board been as anxious to discharge their whole duty as they were to issue the license, they would have appointed a time for hearing the charges contained in the second remonstrance. This was presented at the first meeting after the notice had been given, and at the time when it was the duty of the board to appoint a time for hearing, etc. It was the duty of the board to have heard it read and acted upon it.

It is said this remonstrance was not filed within two weeks of the date of the application, and therefore it was not filed within the time required by law. The fact that the village board were in session, had approved the petition and bond, and that the money had been paid, could make no possible difference. As we read the second section of the act in question, two weeks' notice of the application is necessary. If at the end of that time there are no objections in writing made to the granting of the license, and the board is in session, the license may issue. But we find nothing in the act which prohibits the filing of remonstrances at any time before the arrival of the time fixed for hearing the remonstrance. Indeed, the evident meaning and intent of the section is not to limit the time of filing the remonstrance providing the same is filed before the meeting appointed for final action.

We therefore hold that the first remonstrance filed was sufficient to deprive the board of authority to issue the license until after the hearing provided for by the act, and further, that the second remonstrance was filed and pre-

170 SUPREME COURT OF NEBRASKA,

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Roggencamp v. Seeley.

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sented in time to require the charges to be examined by the board, and that it was their plain duty to appoint a time for such examination. Failing in this the judgment of the district court compelling action was correct, and is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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19	170
39	497

WILLIAM ROGGENCAMP, APPELLANT, VS. WALTER M.  
SEELEY ET AL., APPELLEES.

**Trial.** In cases tried to a court without the intervention of a jury, the finding on questions of fact is entitled to the same respect in the supreme court on appeal as would be accorded to the verdict of a jury under like circumstances, and will not be interfered with unless clearly wrong.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

*L. C. Burr*, for appellant.

*Charles E. Magoon*, for appellees Kendall and Seeley.

*Harwood, Ames & Kelly*, for appellees Eggleston.

REESE, J.

This action is for the specific performance of a written contract for the sale of real estate and to set aside a certain deed executed by defendant Eggleston to defendants Seeley and Kendall. The real contest is as to the contents of the contract of purchase. Plaintiff embodied in his petition the contract, as he alleged it to be, and which was as follows:

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Roggencamp v. Seeley.

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"BENNETT, January 24th, 1884.

"This receipt is an acknowledgment that I have this day sold to William Roggencamp a part of the following described land for the sum of seven hundred dollars, and the said William Roggencamp has paid as part payment one-half part of said purchase money, \$350, and that I will within sixty days from this date have the same surveyed and make a good and sufficient warranty deed upon the surrender of this paper and the payment of \$350, all of that land (except 450 feet, 100 feet wide) four hundred and fifty feet east of the public road of J street, Bennett, said land more particularly described in deeds (W. D's.) from David Gray, trustee, to George W. Eggleston, made of date 2d day of January, 1884, and recorded January 18th, 1884, in the county clerk's office of Lancaster county, Nebraska, *and one not recorded.*"

It is alleged that at the time of the execution of this contract plaintiff entered into the possession of the property purchased, and has tendered the balance of the purchase price and demanded a deed from defendants Eggleston, but that they have refused to convey; that on the 20th day of January, 1884, Eggleston bought the property from Gray, but that through a mistake the tract was omitted from the deed made by Gray and wife, but that it was understood and agreed between said Gray and Eggleston that the proper deed should be made within sixty days. On the 17th of March, 1884, Gray and wife, for the consideration of \$1, deeded the land to Eggleston by quitclaim deed, and on the 4th of April, 1884, Eggleston, for the consideration of \$1, deeded the land to defendants Seeley and Kendall, they having full knowledge of the plaintiff's rights to the premises. Seeley and Kendall have commenced an action for the possession of the land. An injunction and specific performance are prayed.

Eggleston answered, denying the execution of the contract declared upon in the petition, and alleged that on the

date specified in the petition he sold to the plaintiff certain real estate, and executed a contract therefor in writing. This alleged contract is exactly similar to the one set out in the petition, with the exception of the last clause, which is as follows: "Said land more particularly described in deed (W. D.) from David Gray, trustee, to George W. Eggleston, made of date of second day of January, 1884, and recorded January 8th, 1884, in the county clerk's office of Lancaster county, Nebraska."

The difference between the terms of these alleged contracts is the omission of the letter "s" from the word "deeds," and from the letters "W. D.," and the words "one not recorded," from the contract as alleged by plaintiff, and which for convenience we italicize in copying the contract as claimed by plaintiff.

The second deed from Gray to Eggleston not having been executed at that time, it is claimed that the use of the word "deeds" in the plural, and the final words "and one not recorded," show that the whole of the land conveyed to Eggleston by Gray was included in the contract. The original contract which had been delivered to and left with plaintiff had been lost, and the action instituted upon a copy of the record, the contract having been recorded in the county clerk's office.

The question as to what the contract did really contain was the one important and controlling question in the case, as underlying all other issues involved. If the contract was as claimed by defendant, then no further inquiry was necessary, for defendant has tendered a proper execution of the contract according to his version of it, and upon the payment of the deferred payment the deed will be delivered. If the contract was as claimed by plaintiff then the question of the *bona fides* of defendants Seeley and Kendall might become the next important inquiry, as well as whether the same was with or without notice, either actual or constructive.



Upon the first question the finding of the court was directly and unequivocally against plaintiff and in favor of defendants. The first finding is a general one in favor of defendants. The second is, that on the day alleged defendant Eggleston entered into a written contract with plaintiff for the sale of certain land, and the contract made is embodied in the finding in the language as pleaded in defendant Eggleston's answer. The fourth is, "That said contract is the only contract ever entered into between said Eggleston and said Roggencamp concerning any of said lands mentioned in the pleadings in this action."

Applying to this case the well established rule of law repeatedly declared by this court, that the findings upon questions of fact in the trial court, whether by the court or a jury, will not be molested unless clearly wrong, we must refer to the testimony for the purpose of ascertaining whether or not there is sufficient to sustain the finding. Upon this we are met at the outset with the claim by plaintiff that the contract itself was lost and could not be exhibited to the court. This contract would doubtless have proven to be important evidence, for by a careful and critical examination of the instrument itself it might probably have been determined to a certainty whether the letters and words were added at the time of or after the execution.

Plaintiff testified that he could not read the contract, but that Mr. Rhea, the attorney who wrote it, read it over to him and it corresponded with the contract as he stated it, and as alleged in his petition, and that the words and letters referred to were in the contract when signed.

Mr. Rhea testified that he wrote the contract between the parties, that it was acknowledged before him by Eggleston and was delivered to plaintiff. Afterward plaintiff brought it to him to be sent to Lincoln for record, which he did. That the words and letters which Eggleston claimed were not in the contract were there when it was signed.

On the part of the defense Mr. Eggleston testified that at the time he signed the contract the word "deeds" was "deed," and the words "one not recorded" were not in it. That he did not acknowledge it, and at that time he had but one deed in his possession covering the property sold to plaintiff, and that one was from J. S. Gray. That it was at Mr. Rhea's office at the time the contract was made, and the description of the land was taken from it, and that there was never anything said about any other land. It seems to be conceded that Eggleston had but one deed at the time the contract was made, for Mr. Rhea testified that he wrote the words "one not recorded," because one deed was yet to come. There was some other testimony which seemed to corroborate the testimony and claim of plaintiff, while there were some circumstances which seemed to support the theory of the defense. The reason of the thing is, to the mind of the writer, with the theory of the defense. This contract was made January 24th. It is virtually conceded that Eggleston had but one deed. The contract, as contended for by plaintiff, refers for the description to deeds dated January 2d, 1884, and recorded January 18th, 1884, and one not recorded. One what? Evidently, if anything, one of the deeds dated January 2d, 1884. There is nothing in the contract which points to a deed not yet executed. Then would it be likely that a man would for the sum of \$700 sell the land owned by him, and that which he was to get in his next deed from his grantor, without any description of the property? Such, it seems to us, would be a dangerous method of either selling or buying. Would it be likely that an attorney to whose skill was entrusted the writing of a contract of sale of real estate, would depend for his description upon a deed not yet executed? It would seem hardly probable. However honest the witnesses might be who testified in favor of the plaintiff, yet they might be mistaken. The witnesses were all before the court. The tes-

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Wright v. C., B. & Q. R. R. Co.

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timony was conflicting. We cannot say the finding of the court upon this question was wrong. *Hartley v. Dorr*, 15 Neb., 451. *Newman v. Mueller*, 16 Id., 523. The finding of a jury upon the testimony here presented could not be set aside as against the weight of evidence. The decision of the court is entitled to the same respect. *Cheney v. Eberhardt*, 8 Neb., 428. *McLaughlin v. Sandusky*, 17 Id., 110.

The court having found that no such contract as claimed by plaintiff was executed, but that the contract was as claimed by defendant, and there being sufficient evidence to support that finding, it virtually disposes of the whole case and renders it unnecessary to examine the other questions presented.

The decision is therefore affirmed.

#### JUDGMENT AFFIRMED.

The other judges concur.

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#### LUTHER R. WRIGHT, PLAINTIFF IN ERROR, V. THE CHICAGO, BURLINGTON & QUINCY RAILROAD CO., DEFENDANT IN ERROR.

1. **Exemption:** THE WAGES for sixty days' services of laborers, mechanics, or clerks, who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, are exempt from execution, attachment, or garnishment, whether the employee is a resident of the state or not. Such wages are absolutely exempt.
2. **Garnishment.** A foreign corporation having no property of the debtor in this state nor owing money to him payable therein is not subject to garnishment in this state.
3. **—: EXEMPT WAGES.** Where an employer is garnished for wages for 'sixty days' services of a laborer, mechanic, or clerk who is the head of a family, he should state the facts in his an-

19	175
19	246
23	754
24	637
19	175
31	634
32	110
19	175
37	863
19	175
39	687
19	175
51	37
19	175
61	85

swer, showing that such wages are exempt, and that he is not liable as garnishee.

4. ———: ———: DEBT CONTRACTED IN A FOREIGN STATE.

Where a debt was contracted in Iowa, the parties residing there, and a creditor of the debtor not subject to garnishment in that state, the exemption will continue in this state in case an action is brought on the claim.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

*W. J. Connell*, for plaintiff in error, cited: *B. & M. R. R. v. Thompson*, 1 Pac. Rep., 622. *Mooney v. U. P. R. R.*, 14 N. W. R., 343. *Conley v. Chilcote*, 25 Ohio State, 320.

*Howard B. Smith*, for defendant in error, cited: *Pundt v. Clary*, 13 Neb., 407. *Fitzgerald v. Hollingsworth*, 14 Neb., 188. *Pierce v. C. & N. W. R. R.*, 36 Wis., 288. *Thompson's Exemptions*, §§ 833, 838. *Jones v. Comings*, 6 N. H., 497.

MAXWELL, CH. J.

This action was brought before a justice of the peace by the plaintiff against one L. N. Kintz, to recover judgment on an account assigned to the plaintiff. An affidavit for an attachment was made and filed upon the ground that Kintz was a non-resident of this state, and an order of attachment and notice of garnishment served on the defendant. The defendant thereupon filed an answer as follows:

"Now comes the said Chicago, Burlington & Quincy R. Co., and for its answer as garnishee says:

1st. That L. N. Kintz had due him, at the time of the service of the garnishee process in the cause, \$60 as wages earned in its employ.

2d. That said garnishee did not have at or after the service of the garnishee process upon it in this action any other property, money, rights, credits, or effects of any kind

or nature whatever in its possession, or under its control, due or belonging to said L. N. Kintz, defendant.

3d. That said L. N. Kintz, defendant, was hired and employed in, and the contract for said hiring and employment was made in, the state of Iowa, that the service for which said amount is due was performed in said state, and it was agreed between the parties hereto, said garnishee and said defendant, that said wages should be paid in said state; that there has been no demand for the payment of the said amount so due made in the state of Iowa upon the garnishee by said defendant or any other person.

4th. That the cause of action upon which this suit is brought arose in the State of Iowa.

5th. That the assignors, Taylor & Calef, under a pretended assignment from whom the plaintiff in this action claims, were at all times mentioned and still are residents of the state of Iowa; that said L. N. Kintz, defendant, was at all times mentioned herein and still is a married man, the head of a family and a resident of the state of Iowa. The said amount so due as aforesaid is due said defendant as earnings and wages for his personal service performed within ninety days next preceding the service of garnishee process herein; that said amount is not more than sixty days' wages of the said defendant as a clerk in the employ of the garnishee; that under the laws of the state of Iowa the said defendant is entitled to the said amount as exempt from garnishment, attachment, and execution; that the law referred to is as follows: Sec. 3072, Code of Iowa, 1873, provides that any debtor a resident of the state of Iowa, and the head of a family, may hold exempt from execution the following (here follows a specification of the articles exempt). Sec. 3074, Code of Iowa, 1873, is as follows: The earnings of such a debtor, for his personal service or those of his family, at any time within ninety days next preceding the levy are also exempt from execution or attachment.

6th. And further answering said garnishee says: That it is advised that said amount is exempt to said defendant under the laws of the state of Nebraska.

7th. And further answering said garnishee says: That it is a foreign corporation, that it is not a corporation existing under the laws of the state of Nebraska, that it is not a corporation within the county where the action is brought, that the said W. J. Davenport upon whom garnishee process was served in this case has his residence in Council Bluffs, Iowa, that he is present in Nebraska but a few hours each day, that he has no authority to pay out money of said garnishee defendant. That the garnishee is put to great trouble and expense in answering garnishee process in the state of Nebraska, for the reason that the books showing the amount due its employes are not kept in the state of Nebraska, but in the state of Illinois, and its paymaster does not enter the state of Nebraska and has no agent in said state that has authority to audit claims against it or to pay out money for it.

8th. And further answering garnishee says: That it is informed and believes that the pretended assignment under which the plaintiff in this case claims is not *bona fide*, but was made without consideration, and for the sole purpose of evading the exemption law of the state of Iowa, and that said Luther R. Wright is not the real party in interest in this action, but that the said Taylor & Calef are the real party in interest herein. And garnishee alleges that it may endanger its rights and become involved in expensive litigation if it should be required by the court to pay said amount into court.

Wherefore garnishee prays to be discharged from further liability herein."

The plaintiff thereupon moved to strike from the answer of the garnishee the 3d, 4th, 5th, 6th, 7th, and 8th paragraphs, for the reason that the matter therein contained was "unauthorized and voluntary, and forms no part of

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Wright v. C., B. & Q. R. R. Co.

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the answer of a garnishee," etc. The motion was sustained and the defendant ordered to pay the amount of \$41 into court to apply on the judgment to be recovered by the plaintiff against Kintz. Afterwards judgment was rendered by default in favor of the plaintiff for the sum of \$28.89 and \$12.90 costs of suit, and an order was again entered that the defendant "pay into court the sum of \$41 of the amount in its possession belonging to said defendant, said sum to be applied in satisfaction of the above judgment." From this order the defendant took the case on error to the district court, where the order of the justice was reversed. The cause is now brought into this court on error to reverse the judgment of the district court.

The amount involved in this case is not large, but the questions presented are quite important, and as they have not heretofore been considered by this court it is necessary to examine the decisions relating to them.

In 1869 the legislature passed "an act to exempt laborers', mechanics', and clerks' wages in the hands of employers from execution, attachment, and garnishee process," which act as amended in 1873 is as follows (General Statutes, 715):

"Section 1. The wages of laborers, mechanics, and clerks, who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process; *Provided*, That not more than sixty days' wages shall be exempt; *Provided further*, That nothing in this act shall be so construed as to protect the wages of persons who have or are about to abscond or leave the state from the provisions of law now in force upon that subject; *Provided further*, That nothing in this act shall be so construed as to permit the attachment of sixty days' wages in the hands of the employer."

This act is now in force (Comp. St., Code, § 531a). It

was passed as an independent act and not as an amendment of the exemption laws. There is no requirement, therefore, that the debtor shall be a resident of the state, and unless we find from other provisions that it was the intention of the legislature to limit the relief to residents of the state, it must be declared applicable to any head of a family whether a resident of the state or not.

A question similar to that under consideration was recently before the supreme court of Kansas, in *Mo. P. Ry. Co. v. Malby*, 8 Pacific Rep., 235. In that case the parties were residents of Missouri, and the debt was contracted there, and by the laws of that state the money in the hands of the garnishee was exempt from garnishment, and was also exempt in Kansas. The summons was served on the debtor in Bourbon county, Kansas, and the notice of garnishment on the railroad company in the same county. The railroad company filed an answer claiming it was not liable as garnishee, and that the court had no jurisdiction over it, and that the sum due from it to the debtor was exempt from judicial process. The justice, however, refused to act upon this answer. Afterwards the creditor brought an action against the debtor and railroad company to recover \$116.40. The railway company and the debtor answered separately, each claiming that the debt due from the railway company was exempt from judicial process, that the railway company was not liable to be garnished for the same, and that the railway company was not liable in the action. The supreme court sustained the answer. It is said (page 239): "In a proceeding in garnishment where all the parties are non-residents of the state of Kansas and are residents of the state of Missouri, and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the state of Missouri, but the garnishee does business and is liable to be garnished in this state, and the other parties come temporarily into Kansas, and while in Kansas the plaintiff, who is a creditor of



the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is by the laws of the state of Missouri exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in section 490 of the civil code of Kansas, and section 157 of the justice's code of Kansas exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnishment process in Kansas."

In *Mineral Point R. R. Co. v. Barron*, 83 Ill., 365, exemption was claimed under the following provision of statute: "The wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding \$25, shall be exempt from garnishment." The court held that this provision applied to non-residents as well as residents. This was affirmed in *C. & A. R. R. Co. v. Ragland*, 84 Ill., 375.

In *Lowe v. Stringham*, 14 Wis., 241, it was held that the statutory provisions relating to the exemption of personal property applied to persons temporarily sojourning within the state, as well as to permanent residents. It is said (page 244): "It would be entirely inconsistent with the beneficent intentions of the statute, as well as the dignity of a sovereign state, to say that the temporary sojourner or even the stranger within our gates was not entitled to its protection."

In *Hill v. Loomis*, 6 N. H., 263, it was held that certain specific property was exempt by the laws of that state, even though the debtor resided in another state. To the same effect see *Sproul v. McCoy*, 26 O. S., 577. *Haskill v. Andros*, 4 Vt., 609. *Casey v. Davis*, 100 Mass., 124. A few cases may be found in which it has been held the proceedings in cases like that under consideration are valid, but they are placed upon ground that we cannot approve.

While the exemption laws of a state have no extra territorial effect, yet they should be so construed as to give them effect. The statute is remedial in its nature, and in construing remedial statutes the well-known rule as stated by Blackstone (1 Com., 87) should be applied, viz., to consider the old law, the mischief, and the remedy, and to so construe the law as to suppress the mischief and advance the remedy. Here the purpose of the act was to exempt sixty days' wages of the head of a family. The statute is based upon the presumption that the family of a person in the employ of another is usually dependent on such person for support. It can make no difference, therefore, where the family or the head of the family resides, as such wages must be applied to the purposes for which they were intended—the support of the family, or suffering would be the result. It certainly would be a very narrow view of the law to limit its beneficent provisions to residents of the state. This we cannot do; but hold that the language is general in its application, and that sixty days' wages are exempt in favor of the head of a family in all cases, no matter where they reside.

2. It is alleged in substance in that part of the answer that was stricken out, that the defendant is a foreign corporation; that it is not a corporation doing business in this state, and that it has no agent here except W. J. Davenport, upon whom garnishee process was served, whose residence is Council Bluffs, Iowa, but who is present in this state for a few hours each day, etc.

The rule is well settled that process of garnishment served upon a non-resident of the state, but temporarily within it, is not effectual as an attachment. The reason is, that property without the state, in the hands of non-residents, and debts due from them there, are not within the jurisdiction of the court, and therefore the court cannot act upon the property or debt in the hands of such garnishee. *Green v. Farmers', etc., Bank*, 25 Conn., 451. *Casey v. Davis*, 100

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Wright v. C., B. & Q. R. R. Co.

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Mass., 124. *Sawyer v. Thompson*, 24 N. H., 510. That is, if it appears that the garnishee has no money or property of the principal debtor in the state, or that there is no money due from him to be paid therein, he will not be chargeable as garnishee. *Lawrence v. Smith*, 45 N. H., 533. *Nye v. Liscombe*, 21 Pick., 263. *Tingley v. Bateman*, 10 Mass., 343. *Jones v. Winchester*, 6 N. H., 497. *Mathews v. Smith*, 13 Neb., 190. *Danforth v. Penny*, 3 Met., 564. *Gold v. Housatonic R. R. Co.*, 1 Gray, 424. The defendant, therefore, is not liable on that ground.

8. The right of the railroad company to plead the exemption.

In *Missouri Pacific Ry. Co. v. Matly*, 8 Pacific Rep., 235, it was held that the garnishee may interpose the exemption as well as the debtor himself. *Moll v. Jones*, 33 Kas., 112. This is according to the established rule, that the garnishee must disclose every fact which would have prevented a judgment against him. Drake on Attachment, § 630, and cases cited. As sixty days' wages are absolutely exempt in favor of the heads of families, it is the duty of an employer, when summoned as garnishee, to state that the debtor is the head of a family, and that the amount owing to said debtor—stating it—is for wages earned within sixty days. This, if true, is a complete defense to the garnishment proceedings. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	184
20	560
19	184
35	292
19	184
51	172
51	200
55	672
19	184
56	136

THOMAS M. ROBERTS, PLAINTIFF IN ERROR, V. SARAH  
E. TAYLOR ET AL., DEFENDANTS IN ERROR.

1. **Liquors: ACTION AGAINST SALOON KEEPER: PETITION.**  
Where the allegations in a petition filed by a wife and minor children against a saloon keeper for loss of means of support, caused by liquor sold to the husband and father, are that liquors were sold to the husband and father in quantities sufficient to produce intoxication, which Wm. H. T. drank and thereby "became intoxicated, and while in this drunken condition R. (the saloon keeper) continued to furnish him such intoxicating liquors," an allegation thereafter made, that by reason of the use thereof "he has become an habitual drunkard," is not irrelevant.
2. ———: ———: ———. The words "in a great measure," qualifying the allegation of loss of labor and support by the husband, *Held*, Sufficiently definite.
3. **Trial: OBJECTION TO PETITION.** Where objection is made on the trial of a case for the first time, that the petition does not state facts sufficient to constitute a cause of action, the court should, if possible, sustain the petition, or permit an amendment thereto to be made instanter.
4. **Evidence examined, and verdict *Held*, To be excessive, with leave to plaintiffs to remit from the judgment the sum of \$295.66½.**

ERROR to the district court for Burt county. Tried below before NEVILLE, J.

*R. B. Daley*, for plaintiff in error.

*Hopewell & Dickinson*, for defendants in error.

MAXWELL, CH. J.

This action was brought by the defendants in error against the plaintiff in the district court of Burt county, to recover for loss of means of support of the husband and father, caused by intoxication from liquor furnished in part,

at least, by the plaintiff in error. On the trial of the cause the jury returned a verdict in favor of the defendants in error for the sum of \$995.66 $\frac{1}{2}$ , upon which judgment was rendered. A large number of errors are assigned, which will be considered in their order.

*First.* That the court erred in refusing to strike certain words out of the petition. The following is a copy of the petition, omitting formal allegations :

"1. The plaintiff, Sarah E. Taylor, for herself, and, as next friend, for her minor children, to-wit: Lillie E., age 15 years; Rodes J., age 11; Nettie E., age 8; Nettie G., age 5; Charles A., age 3; complains of the defendant, Thos. M. Roberts, for that on the 15th day of March, A.D. 1883, and during all the intervening time since, the said defendant was and has been a saloon keeper and engaged in the retail traffic in intoxicating liquors in the town of Tekamah, Burt county, Nebraska.

"2. During the time aforesaid the plaintiff, Sarah E. Taylor, was, and for a long time prior thereto had been, the wife of the said Wm. H. Taylor, and the other plaintiffs are their minor children.

"3. That the plaintiffs were all dependent on said Wm. H. Taylor for their means of support; that prior to said 15th day of March, 1883, that said Wm. H. Taylor was an able-bodied, industrious, energetic man, and provided a good living for his family, the plaintiffs aforesaid; that the proceeds of his labor and earnings amounted to about the sum of \$1,000 per year, which he applied to their support; that at the above named dates the said plaintiffs and Wm. H. Taylor were in comfortable circumstances and had \$500.

"4. That on or about the 15th day of March, A.D. 1883, and at divers times thereafter, continuing down to the commencement of this action, the said defendant sold and furnished to the said Wm. H. Taylor intoxicating liquors in quantities sufficient to cause intoxication, which said Wm. H. Taylor drank and thereby became intoxicated,

and while in this drunken condition the said defendant continued to furnish him such intoxicating liquors.

"5. The said Wm. H. Taylor, by reason of the use of said intoxicating liquors so as aforesaid furnished him by said defendant, has become an habitual drunkard, and these plaintiffs have in a great measure been thereby deprived of his labor and support during the whole of the time aforesaid. The \$500 above referred to has been squandered and the plaintiffs are left wholly without means of support.

"6. The plaintiff, Sarah E. Taylor, and said minor children constitute one family and have sustained damages in the premises in the sum of \$5,000."

The defendant filed a motion to strike from said petition the following words, for the reason that the same are irrelevant to the issue and redundant, to-wit:

The said Wm. H. Taylor "has become an habitual drunkard and."

Which motion was overruled and the defendant excepted.

Thereafter the defendant filed a motion to require the plaintiffs to specify the amount of the husband's labor and support of which they had been deprived as averred by the words "in a great measure," and asking that plaintiffs specify the items and dates of such lost labor and support.

Which motion was overruled, to which the defendant then and there excepted.

The defendant thereupon filed an answer to said petition, as follows:

"1. The defendant, answering the plaintiffs' petition, admits that he was a saloon keeper as charged, and that Sarah E. Taylor and the other plaintiffs were the wife and children of Wm. E. Taylor and were dependent on him for their means of support, and that they constitute one family.

"2. Said Wm. H. Taylor was on and prior to the 13th day of March, 1883, a man who indulged in the use of intoxicating liquors, and by reason of this habit for several years prior to March 15, '83, had neglected and failed to

appropriate all his earnings and time to the support of his family.

"3. Defendant says that from February 1st to September 10 he did not sell nor give, nor permit to be sold or given by his agents or employes, to Wm. H. Taylor any intoxicating liquor of any character.

"4. Defendant avers that said plaintiffs ought not to have and maintain their action against him for loss of their means of support, by reason of the selling or furnishing of intoxicating liquor by said defendant to said Wm. H. Taylor, during that portion of the time mentioned in plaintiffs' petition from and after September 15th, 1884, to the commencement of this action, for the reason that the defendant says that on or about the last mentioned date the plaintiff, Sarah E. Taylor, personally directed and requested the defendant to let the said Wm. H. Taylor have intoxicating liquor by the drink whenever he wanted it, which request has never been withdrawn, and all liquors thereafter sold and furnished by the defendant to said Wm. H. Taylor were so sold and furnished in pursuance of such request and direction of said plaintiff. This was done with great care on the part of said defendant to restrain said Wm. Taylor from drinking such an amount as would cause him to become intoxicated.

"5. Defendant denies each and every allegation in said plaintiffs' petition contained, and not hereinbefore admitted."

The reply is a general denial.

The first objection is, that the court overruled the motion to strike out of the petition the words that Taylor "has become an habitual drunkard." The words are evidently used to indicate that from the almost constant use of intoxicating liquor furnished by the plaintiff in error, Wm. H. Taylor was so far under the influence of such liquor as to be incapable of providing for his wife and family. In this sense the words are proper and the court did not err in overruling the motion.

*Second*, To require "the plaintiffs to specify the amount of the husband's labor and support of which they have been deprived, as averred by the words 'in a great measure.'"

These words must be construed with reference to the prior allegation that the "defendant (plaintiff in error) sold and furnished to said Wm. H. Taylor intoxicating liquors in quantities sufficient to cause intoxication, which said Wm. H. Taylor drank and thereby became intoxicated, and while in this drunken condition continued to furnish him such intoxicating liquors," and other allegations of like nature, and that, therefore, the plaintiffs below have been to a great extent deprived of the means of support. The sale of liquor and intoxication of the husband are the cause of the injury, and the loss of means of support the consequence. If the loss is not entire it may be stated in such words as show the fact. Where it is alleged that the intoxication is continuous, it would be impossible to state definitely the number of hours the party was partially sober so as to be able to perform some labor. A general allegation, therefore, is sufficient.

On the trial of the cause the attorney for the defendant below objected to the introduction of any testimony, for the reason that the petition fails to state a cause of action. The motion was overruled, to which exceptions were taken and the ruling thereon is now assigned for error.

The petition certainly states a cause of action. It is not as definite, perhaps, in some respects as could be desired, but it contains all the averments necessary to entitle the plaintiff to recover.

The practice of objecting on the trial to the introduction of evidence because the petition fails to state a cause of action is not to be encouraged. When the witnesses are in attendance and a large amount of expense incurred which would have been avoided had an objection been made by demurrer at the proper time, the court will, if possible,



sustain the petition, and if need be, permit an amendment to be made instanter to cure the defect. But an amendment was unnecessary in this case. The objections, therefore, were properly overruled.

The testimony tends to show that in March, 1883, Wm. H. Taylor, with his wife and children, removed to Burt county, in this state, from Washington county, Indiana; that prior to that time his wife testifies "he never was a man that indulged in drink. Once in a great while when he was going to town he would get a little liquor and would probably take a little pint bottle home with him and would drink it over Sunday. He never would go on a spree for a month or six weeks in his life." He had owned a small farm in that state, which had been sold and about \$500 of the proceeds were brought to this state. Soon after coming here he became addicted to the almost constant use of intoxicating liquor, to such an extent as to be incapable of transacting business, and seems, during a portion of the time at least, to have been one of the idlers around the saloon of the plaintiff in error and others. During this time he contributed but very little to the support of himself and family, while the money that he brought here had been exhausted.

The wife seems to have been industrious, and by constant labor procured for the family nearly all the support it has received. Mr. Taylor is shown to be a robust, healthy man when free from the effects of intoxicating drink, and capable of earning about \$9.00 per week. The testimony shows that in February, 1884, Mrs. Taylor notified the plaintiff in error not to sell her husband any more liquor; that afterwards, about August 15th, finding that her husband obtained all the liquor he wanted in bottles, she went with him to the residence of the plaintiff in error and withdrew the order, and, as she testifies, "told Roberts that if he would only give him a drink occasionally as he needed it, he might sell to him." It is not claimed that for liquor sold to the husband in small quan-

tities while this request was in force that there could be any recovery, but for any abuse of the same no doubt there may be. It does not appear who furnished the liquor in bottles to the husband prior to the time the wife made this request, but it is pretty evident that some of it was drank not far from the saloon of the plaintiff in error, and upon the whole case it is very clear that the plaintiff in error furnished, during the time stated in the petition, intoxicating liquor to Taylor, which tended to cause his intoxication. How many others may have aided in producing this result it is not material now to inquire, as the person who gives away or sells intoxicating drink, which was drank by Taylor on or about the time of the intoxication complained of, is liable for any damages sustained from such intoxication. *Kerkow v. Bauer*, 15 Neb., 150. *Elshire v. Schuyler*, 15 Neb., 561. *Warrick v. Rounds*, 17 Neb., 416-417.

The questions in regard to the instructions are disposed of by the decision on the motions heretofore referred to. It is unnecessary, therefore, to review them at length.

The damages, however, are excessive under the proofs in the case, and the plaintiffs below will have leave to remit from the judgment the sum of \$295.66½, leaving the sum of \$700, and upon condition that such remittitur is entered within thirty days from this date the judgment is affirmed; otherwise it will be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. JAMES W. SAGE, v.  
LLOYD D. BENNETT, TREASURER OF PLATTSMOUTH.

1. **Municipal Corporation: TAX ON BUSINESS.** Cities of the second class have authority under subdivision VIII., of section 69, of the act of 1879, entitled "An act to provide for the organization, government, and powers of cities and villages," to impose an occupation tax upon liquor dealers in addition to the amount paid for license to sell liquor.
2. ———: ———. The payment of such tax, however, cannot be made a condition precedent to the issuing of license to sell intoxicating liquor.
3. **Referee.** The findings of a referee, like the verdict of a jury, will not be set aside unless they are clearly wrong.

ORIGINAL application for mandamus.

*Chapman & Polk*, for relator.

*M. A. Hartigan*, for respondent.

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendant, who is city treasurer of Plattsmouth, to pay two certain orders for \$50.00 each; drawn by the mayor and clerk of said city on the "special license tax fund," in which it is alleged that at the date of presenting said orders to the defendant there was in his hands the sum of \$3,584.92. The money is claimed under ordinance 132 of said city, which will be referred to hereafter.

To the petition the defendant filed an answer in which he admits that Plattsmouth is a city of the second class; admits that he is city treasurer, and that "the city, under ordinance number 115 of the city of Plattsmouth, licensed seven saloons in said city in the spring of 1885 for the next fiscal year, and exacted and received the sum of \$500 each from said seven saloons."

19	191
94	413
19	191
30	852
19	191
39	008
19	191
51	874
19	191
56	680
19	191
161	494

"Admits.that ordinance 132 was passed on the 14th day of April, 1884, and that the said city collected moneys thereunder as a license tax ; that in the month of May the said saloon keepers paid into the city treasury and to this defendant as such treasurer the sum of five hundred dollars for each of said saloons, in all the sum of \$3,500.00 which this defendant now holds, and is advised and believes the same is the money of and belongs to the common school fund of the city of Plattsmouth, under article eight (8), section five (5) of the constitution of Nebraska.

Defendant further answering says, that at the time of the issuance under ordinance 115, the whole sum of one thousand dollars was paid into said treasury, and to this defendant as said treasurer, before and as a condition precedent to the issuance of such license under ordinance number 115 as aforesaid, and in a single sum, the clerk of said city having refused to issue the said license until the whole sum of \$1,000 was paid in hand, and that no other or different moneys have been paid or received by this defendant, and that the moneys so held by him were received as aforesaid and not otherwise."

The following is a copy of ordinance 115:

"An ordinance to license, regulate, and prohibit the selling or giving away of any intoxicating, malt or vinous, mixed or fermented liquors.

"Be it ordained by the mayor and councilmen of the city of Plattsmouth. That in compliance with chapter 50 of the Compiled Statutes of the State of Nebraska, entitled "Liquors," all persons intending to sell any intoxicating, malt, vinous, mixed, or fermented liquors within the city of Plattsmouth or in any of the wards thereof are hereby required :

"Sec. 1. To present to the mayor and city council a petition for such a license to sell liquors signed by 30 of the resident freeholders of the ward (or where there are not 60 freeholders a majority of them) in which the applicant wishes to do business.

"Sec. 2d. The applicant for the permission to sell liquors as aforesaid shall present to the city council and file with his said petition a bond in the penal sum of \$5,000, payable to the state of Nebraska, with at least two good and sufficient securities, freeholders of Cass county, said bond to be approved by the city council. The bond shall be conditioned that the applicant to sell liquors will not violate any of the provisions of chapter 50 of the Compiled Statutes of the state of Nebraska, and that he will pay all damages, fines, penalties, and forfeitures which may be adjudged against him under the provisions of such chapter.

"Sec. 3d. No action of the council shall be taken upon any application until two weeks' notice of the filing of the same shall have been made in the official newspaper of the city of Plattsmouth, and if there are no objections made in writing and filed with the city clerk, and all of the provisions have been complied with, the license shall be issued by the said city clerk. If there be any objections filed in the office of the city clerk, the mayor shall call a meeting of the council to hear the case, and if it shall have been proven that the applicant for license has been guilty of the violation of any of the provisions of the act entitled "Liquors," within the space of one year, or if any former license shall have been revoked for any misdemeanor against the laws of the state of Nebraska, then the council shall shall refuse to permit the issuance of such license.

"Sec. 4th. On the filing of the petition and bond aforementioned the applicant for license shall deposit with the city clerk \$500, which sum shall be the amount required by the city for license to sell liquors for the municipal year herein provided. If by any reason the license should be refused by said city council, the said sum of \$500 shall be returned to the person depositing the same.

"Sec. 5th. A druggist, upon compliance with the provisions heretofore contained, and subject to all the penalties contained in chapter 50 of the Compiled Statutes of

the state of Nebraska, entitled "Liquors," will be granted a permit without any license fee, except the cost of issuing said permit to sell spirituous, vinous, and fermented liquors for medical and mechanical purposes only."

The following is a copy of ordinance 132:

"An ordinance providing for the levying and collecting of a license tax on occupations and business carried on within the limits of the city of Plattsmouth, to regulate the same, and to repeal ordinance No. 117, entitled an ordinance to provide for the levying and collecting of a license tax on occupations and business carried on within the limits of the city of Plattsmouth, to regulate the same, and to repeal an ordinance of the city council of said city, entitled an ordinance providing for the assessment and collection of license tax, being ordinance No. 86.

"Be it ordained by the mayor and councilmen of the said city of Plattsmouth, Nebraska:

"Sec. 1st. That each and every person, firm, association, or other corporation carrying on the occupation or business herein mentioned within the limits of the city of Plattsmouth shall pay into the city treasury annually the sums named as hereinafter provided as a special license tax.

"Sec. 2d. The money paid into the city treasury under the provisions of this ordinance shall constitute and be known as the 'special license tax fund.'

"Sec. 3d. The special license tax fund shall only be used for paying the expense of grading and repairing streets, constructing and repairing sidewalks, the lighting of the city, and the paying of policemen; *Provided, however*, that the city council may at any time, by a majority vote of the councilmen elect, authorize the passage of an ordinance transferring money from the special license tax fund into the general fund of the city.

"Sec. 4th. Under the provisions of the ordinance and the power vested by the ..... there is hereby levied on

## State v. Bennett.

Non-resident auctioneers, per day.....	\$10 00
Hawkers and peddlers of goods, jewelry, and patent medicines, per day.....	10 00
For each dollar store, concert, or exhibition, and all games not prohibited by the statutes, per day..	10 00
Non-resident dentists, per day.....	2 50
Non-resident canvassers, per day.....	1 00

## LICENSE PER ANNUM.

Resident auctioneers.....	\$20 00
Bank .....	10 00
Grocery store—retail .....	5 00
Grocery store—wholesale.....	25 00
Meat market.....	5 00
Druggists .....	10 00
Dealer in dry goods carrying \$10,000 or less of stock.....	10 00
Dealers in dry goods carrying more than \$10,000 and less than \$15,000.....	15 00
General merchandise and clothing dealers the same as dry goods.	
Hardware dealers carrying \$5,000 or less of stock	5 00
Hardware dealers carrying more than \$5,000 .....	10 00
Jeweler carrying \$10,000 or less of stock .....	10 00
Jeweler carrying more than \$10,000.....	15 00
Boot and shoe dealer, exclusive.....	10 00
Commission stores .....	10 00
Grain dealer.....	10 00
Tobacco and cigar dealer .....	5 00
Sewing machine dealer or agents.....	5 00
Millinery and notion dealer.....	5 00
Variety store and dealer in stationery.....	10 00
Merchant tailor.....	5 00
Livery and feed stable.....	10 00
Furniture dealer.....	10 00
Saddle and harness dealer .....	5 00
Hotel.....	10 00

Restaurant and confectionery.....	\$ 5 00
Real estate dealer .....	5 00
Physicians and surgeons .....	5 00
Wagon and blacksmith shop.....	5 00
Dealers in stoves and tinware, exclusive.....	5 00
Flour and feed store.....	5 00
For each theatrical, opera, minstrel, or circus troupe	5 00
Agricultural and implement dealer.....	5 00
Resident dentists.....	5 00
Brick layers .....	5 00
Ice dealers.....	5 00
Saloons retailing liquor as a beverage, in addition to such sums as are now or hereafter shall be required under the laws of Nebraska .....	500 00
Billiard halls, one table .....	25 00
Each additional pool or billiard table.....	10 00
Bagatelle or Jennie lead tables, each.....	5 00
Bowling alley .....	25 00
Hack, dray, or omnibus.....	5 00
Lumber dealer .....	10 00
Photograph galleries .....	5 00
Express company .....	15 00
Telephone company .....	10 00
Telegraph company .....	10 00
Resident life insurance agents .....	5 00
Non-resident life insurance agents, per week .....	1 00
Each circus or menagerie, per day .....	50 00
Each side-show with circus.....	10 00
Non-resident parties consigning goods to resident auctioneers for sale, per day.....	5 00
Coal dealers.....	5 00
Printing offices .....	5 00
Second-hand stores .....	5 00
Shooting gallery .....	15 00
Shooting gallery, per week.....	3 00
Skating rink.....	5 00



"Sec. 5th. All license provided for under this ordinance shall be issued and signed by the mayor and clerk; they shall specify the amount of money paid, the kind of business licensed, the name of the person to whom issued, and the length of time for which same was issued. The city clerk shall attest all licenses with the corporate seal, and deliver the same to the person applying therefor only on the production of a receipt signed by the city treasurer for the proper sum of money required by the ordinance. The person or persons to whom license is issued shall produce the same for inspection on demand of any resident of the city. No license shall be transferable in any manner whatsoever.

"Sec. 6th. All license issued under the provisions of this ordinance shall commence and end with the fiscal year, provided, however, that on and after October 1st of each year license may be issued good to the end of the fiscal year by payment to the city treasurer of half the amount required for an annual license.

"Sec. 7th. The license tax imposed under the provisions of this ordinance shall be payable in cash or in general fund warrants of the city. In case such licenses are paid in warrants the city clerk shall cancel the same, keeping a record thereof, and shall return the same to the city council.

"Sec. 8th. All persons who are required to take out annual license under the provisions of this ordinance shall apply to the city clerk for the same on or before the first Tuesday in May of each year, or as soon thereafter as they become engaged in business.

"Sec. 9th. Any person violating any of the provisions of this ordinance, or transacting any of the kinds of business herein taxed without having first obtained license therefor as herein provided, shall be guilty of a misdemeanor, and on conviction thereof shall pay a fine of not less than \$5 or more than \$100, or may be impris-

oned not more than ten days; and moreover be liable to a civil action for the amount of such license tax.

"Sec. 10th. All license heretofore granted for any kind of business or occupation herein specified, not yet expired, shall be and remain in full force until the time for which the same were granted shall have fully expired."

The case was referred to a referee agreed on by the parties to take the testimony and find the facts. The referee heard the testimony and found the facts as follows:

"1st, That Lloyd D. Bennett, respondent herein, is treasurer of the city of Plattsmouth.

"2d, That as such treasurer the said Lloyd D. Bennett collected the moneys in question in this suit.

"3d, That said Lloyd D. Bennett deposited the moneys in question in this cause in the 'Special License Tax Fund' of the city of Plattsmouth.

"4th, I find that a portion of said moneys in dispute, to-wit, the sum of \$3,500, was paid by the seven saloons of this city, being the sum of \$500 each.

"5th, That the city of Plattsmouth issued to James W. Sage, relator herein, the two orders or warrants on the 'Special License Tax Fund,' as alleged in relator's petition. That relator presented the same to said Lloyd D. Bennett, respondent herein, and demanded payment thereof. That said Bennett refused to pay the same, and endorsed on each of said warrants "presented for payment and not paid for want of funds, June 24th, 1885."

"6th, I find that at the time said warrants were so presented for payment, payment refused and so endorsed, that there was in the hands of Lloyd D. Bennett, city treasurer of Plattsmouth, and to the credit of the 'Special License Tax Fund,' the sum of \$3,500.

"7th, I find that under ordinance 115, each person desiring to engage in the liquor business was required to pay into the school fund \$500, and that under ordinance 132 a business tax or special license tax of \$500 was levied

upon each and every person engaged in the liquor or saloon business.

"8th, I find that the moneys in this suit were paid into the city treasury by the several saloon keepers of this city under ordinance 132, at the same times that they paid into the city treasury their \$500 respectively for their saloon or liquor license under ordinance 115; and that they each paid said sums under said ordinances Nos. 115 and 132 without the same being demanded of them by the city, and that the same was paid voluntarily on their part.

"9th, I find that no saloon keeper or liquor dealer paid the \$500 under ordinance 115 and demanded his liquor license without having paid his \$500 into the special license tax fund.

"10th, I find there was no order or resolution of the city council, nor any requirement on the part of the city of Plattsburgh, by which a person desiring to engage in the liquor or saloon business in said city was compelled to pay into the city treasury \$500 under ordinance 132 before the city would issue him a liquor license under ordinance 115. As to whether the city would, as a matter of fact, have issued a license under ordinance 115 without the applicant first having paid \$500 into the city under ordinance 132, I am unable to find, for the very reason that no evidence has been introduced showing that such an application had been made since the passage and taking effect of said ordinance 132."

1st. The defendant excepts to the third finding of fact, "that the respondent Bennett deposited the moneys received as special license by Bennett in the special license tax fund. The same is not supported by the evidence, and is without foundation in fact."

In Bennett's report under oath, made to the council of the city of Plattsburgh on the 10th day of August, 1885, which is attached to the petition and made a part thereof, we find the following:

## "SPECIAL LICENSE FUND.

Amount on hand June 30th.....\$3524.92

Amount collected in July..... 10.00

\$8534.92"

It is alleged that this report is not identified, and there is no evidence that it was considered by the referee. This is a mistake, however, as the seventh paragraph of the petition contains the following allegation :

"Plaintiff further charges, that under and by virtue of said ordinance No. 132, and under and by virtue of the law in force in this state, a general occupation or business tax was levied upon all occupations and business in said city of Plattsmouth, uniform in respect to the classes of occupation or business upon which said tax was levied; and a large amount of such tax has been collected and paid into the treasury of the city of Plattsmouth, and passed and credited to the 'special occupation' or 'license tax fund' of said city, to-wit, to the amount of at least \$3534.92, which amount your relator here avers and charges has been collected of and from the different classes of business and occupations in said city of Plattsmouth by the city treasurer of said city as occupation tax for the year 1885, and which money is deposited in and belongs to the special license tax fund of said city, and which fund is in the possession and under the control of said Lloyd D. Bennett, as city treasurer of Plattsmouth, as evidenced by the report of said city treasurer under oath, made to the city council of Plattsmouth City at a regular meeting of said city council held on the 10th day of August, A.D. 1885. A copy of said report is hereto attached and made a part of this petition." The report is attached to the petition. This fact, no doubt, was overlooked when the objection was made. The third finding is fully sustained by the evidence.

2d. That "the sixth finding of fact is without evidence

to support the same, and is not supported by the evidence submitted."

The sixth finding is, that there was in the hands of the defendant in the "special license tax fund" the sum of \$3,500, and is answered by the report of the treasurer himself, made but a short time before the action was instituted, showing more than that sum in his hands in that fund. The objection, therefore, is untenable.

3d. "That tenth finding of fact is not supported by the evidence submitted, and is without evidence to sustain the same, is vague, indefinite, and uncertain."

The tenth finding is, in effect, that there was no order, resolution, or requirement of the city of Plattsburgh by which a person desiring to engage in the saloon business was compelled to pay \$500, under ordinance 132, before he could obtain a license under ordinance 115.

Upon this point a large amount of testimony was taken, and in no instance does it appear that the payment of \$500, under ordinance 132, was made a condition precedent to the issue of license under ordinance 115.

John D. Simpson, who was city clerk from 1877 to 1885, testifies that no such condition was imposed, and that the occupation tax was frequently paid in city warrants. The present city clerk testifies that no such condition was imposed, and three members of the city council testify to the same facts.

Three saloon keepers were sworn, who testify in substance that, while they each paid the \$1,000 to the city treasurer at one time, that they understood that one-half was paid under ordinance 132. Questions were ingeniously framed, so that they would answer that the entire sum was paid as a condition precedent to the issuing of a license under ordinance 115, but failed to elicit proof of that fact, all that was shown being that at the same time they paid for and received a license under ordinance 115 they paid the amount charged under ordinance 132, it being then due.

The tenth finding, therefore, is in harmony with the testimony and is fully sustained by it, and the objection is not well taken.

But even if all these exceptions were sustained, still, under the findings to which no objection is made, the relator would be entitled to the writ. Thus, the first and second findings are, in substance, that the defendant is treasurer of Plattsmouth, and as such collected the moneys in controversy, and now has them. The fourth finds the amount received; the fifth, that the relator is the holder of two orders or warrants on the "special license tax fund," which the defendant has refused to pay. The seventh finding is, that each liquor dealer was required to pay \$500 into the school fund, under ordinance 115, for his license; and under ordinance 132 a "business tax or special license tax of \$500 was levied upon each and every person engaged in the liquor or saloon business." The eighth finding is, that the moneys in controversy were paid into the city treasury under ordinance 132 at the same time they paid the sums for license under ordinance 115, "without the same being demanded of them by the city, and that the same was paid voluntarily on their part." These facts being conceded to be true by the failure to except to the same, are sufficient to authorize the court to grant the writ. The fact that the money in controversy was paid in voluntarily by the parties, under ordinance 132, and is now in the treasury in the "special license tax fund," imposes the duty on the defendant of paying out the same on orders drawn on that fund. The money being paid under ordinance 132 must be applied to the purposes for which it was collected.

In *State v. Wilcox*, 17 Neb., 219, the second section of the ordinance virtually fixed the license at \$1,000, \$500 of which was to be used as a license fee, and \$500 as an occupation tax. The fourth section made the payment of the license fee and the occupation tax a condition precedent to

the granting of license. It is said (page 224): "It will be observed that the entire sum of \$1,000 is required to be paid by the applicant for license, to enable him to obtain the same. No part of this sum is obtained as a tax, but as a condition of obtaining the license. The \$1,000 is paid as a whole for the license—not a part for license and a part as tax—because without the payment of the entire sum the license would not be issued." There is a plain intimation in the opinion that an occupation tax not imposed as a condition of obtaining the license would be sustained.

Sec. 1, art. 9 of the constitution, authorizes the legislature "to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, innkeepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, venders of patents, in such manner as it shall direct by general law uniform as to the class upon which it operates."

Subdivision VIII. of section 69 of the "act to provide for the organization, government, and powers of cities and villages," which took effect Sept. 1, 1879, authorizes such cities "to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village and regulate the same by ordinance. All such taxes shall be uniform in respect to the classes upon which they are imposed," etc. The next subdivision authorizes them "to license, regulate, or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor," etc. . Comp. St., ch. 14.

The power, therefore, to impose an occupation tax on saloons is clearly conferred both by the constitution and statute.

Judge Cooley, in speaking of this species of taxation, says: "If a revenue authority is what seems to be conferred, the extent of the tax when not limited by the grant itself must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual

mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being so heavy as to be prohibitory, thereby defeating the purpose," etc. Cooley on Taxation, 408.

The constitution of Michigan contains a provision that, "the legislature shall not pass any act authorizing the grant of license for the sale of ardent spirits or other intoxicating liquors." (Art. 4, § 47.)

In 1875 the legislature of that state passed an act imposing a specific tax on liquor dealers. The validity of this tax was denied, and the question came before the supreme court of that state in *Youngblood v. Sexton*, 32 Mich., 406. The opinion of the court was delivered by Cooley, J., and contains an elaborate review of the authorities, the tax being sustained. It is said (page 425): "Taxes upon business are usually collected in the form of license fees; and this may possibly lead to the idea that seems to prevail in some quarters, that a tax implied a license, but there is no necessary connection whatever between them. A business may be licensed and yet not taxed, or it may be taxed and yet not licensed. And so far is the tax from being necessarily a license that provision frequently is made by law for the taxation of a business that is carried on under a license existing independent of the tax. Such is the case where cities under proper legislative authority tax occupations which are carried on under licenses from the state. *Ould v. Richmond*, 23 Gratt., 464. *Napier v. Hodges*, 31 Texas, 287. *Outhbert v. Conly*, 32 Geo., 211. *Wendover v. Lexington*, 15 B. Mon., 258. See also *Home Ins. Co. v. Augusta*, 50 Geo., 530. The license confers a privilege, but it is not perceived why a privilege thus conferred should not be taxed as much as any other. The federal laws give us an illustration of the taxation of illegal traffic. A case in point was that of the taxation of the liquor traffic in this state previous to the repeal of the prohibitory law;



the federal law found a business in existence and it taxed it without undertaking to give it any protection whatever. *McGuire v. Com.*, 3 Wall., 387. *Pervear v. Com.*, 5 Wall., 475. What would have prevented the state from taxing the same traffic at the same time? Is it any more restricted in the selection of subjects for taxation than the general government?"

In *Ould v. Richmond*, 23 Gratt., 464, an ordinance imposing a business tax upon lawyers was sustained, although the persons taxed held a license from the state to practice law, and the municipal tax went to nullify it. Anderson, J., says: "It (the license to practice law) is a vested civil right, yet it is as properly a subject of taxation as property to which a man has a vested right."

In *Napier v. Hodges*, 31 Texas, 287, under an act of the legislature of October, 1866, a retail dealer in intoxicating liquors in less than one quart was required to execute and deliver to the county treasurer a bond payable to the county judge with two or more sureties with certain conditions, and to pay into the county treasury a license tax of \$300 per annum, whereupon the county clerk was required to issue to the applicant a license to sell intoxicating liquors. In November, 1866, the legislature passed another act by which the retailer who is "pursuing or about to pursue this occupation of selling such liquors in quantities less than a quart, is assessed with a tax at the rate of \$300 per annum for the benefit of the state treasury," and was required by another act thereafter passed and approved to make application to the assessor and collector and pay the second amount, the tax to him prior to pursuing such occupation, under a penalty of fifty per cent and costs for a failure to do so within five days thereafter. The court held that all these acts were valid and that the second was a legitimate exercise of the taxing power.

In *Wendover v. Lexington*, 15 B. Mon., 258, it was held that the legislature had power to give to cities within the

state authority to tax for revenue purposes lottery offices for the sale of lottery tickets within their limits, although the lotteries may have been authorized by the legislature.

In the *License tax cases*, 5 Wall., 462, it was held that licenses under the act of congress of June 30, 1864, to provide internal revenue to support the government and the acts amendatory thereof, conveyed to the licensee no authority to carry on business within the state, and that the requirement was only a mode of imposing taxes; and in *Purvear v. Com.*, Id., 475, it was held that a license from the federal government for the sale of intoxicating liquors did not abridge the power of the state to tax or prohibit the licensed business.

In *St. Louis v. Spiegel*, 75 Mo., 145, a license fee had been imposed on the keepers of meat shops in St. Louis, which was \$100 in one part of the city and \$25 in another. The court held that the authority to impose the tax was clearly conferred but that it must be uniform, and because of want of uniformity the act was held to be invalid.

In *Glasgow v. Rowse*, 43 Mo., 479, a tax of three per cent was imposed on the salaries of all officers who were exempt from military duty in consequence of such offices, and two per cent on the salaries and incomes of all other persons, provided such salaries or incomes exceeded \$600. The act was sustained, notwithstanding a provision in the constitution that all taxes should be uniform.

In *Kitson v. The Mayor*, 26 Mich., 325, specific taxes on saloon keepers in Ann Arbor were sustained, although in the form of licenses, the constitution of that state prohibiting the licensing of the sale of intoxicating liquor; and to the same effect is *Walcott v. The People*, 17 Mich., 68.

In *Burlington v. Putnam Ins. Co.*, 31 Iowa, 102, the city charter authorized the city council of Burlington to charge such sums "as they shall deem expedient and just." Under a resolution of the city council insurance companies

or agencies whose premiums amounted to less than \$500 were required to pay \$5, where the amount was \$500 but less than \$1,000 the charge was \$10, and all in excess of \$1,000 the charge was \$15. The authority was upheld.

In *People v. Martin*, 60 Cal., 153, an occupation tax in the form of a license tax was imposed on the defendant, who was engaged in the business of selling goods, wares, and merchandise in the county of Santa Cruz. The court held that under the provisions of the constitution the tax must be imposed by the municipality in which the defendant resided, and not by the county.

Many other cases to the same effect could be cited, but in view of our constitution and statute it seems unnecessary, as the power to impose taxes upon certain occupations, including liquor dealers, is expressly conferred. This is entirely independent of the license to sell intoxicating drinks. To procure a license for that purpose the applicant must be a man of respectable character and standing, and a resident of the state. To obtain a license he must present the petition of thirty resident freeholders of the town or precinct where the sale of such liquor is to take place to the proper authority. Notice must then be given, and if any objection, protest, or remonstrance is filed against the issuing of license, a hearing must be had thereon from which an appeal may be had to the district court. If a license is granted the applicant must pay at least the sum required by the licensing board, which in no case can be less than \$500, and give a bond to the state in the sum of \$5,000, with two good and sufficient sureties, freeholders of the county. The law also makes the licensee liable for all damages that the community or individuals may sustain in consequence of such traffic. The law also imposes heavy penalties upon any one who, without having complied with the provisions of the law, shall sell or give away any intoxicating liquors.

The statute, in fact, is a complete prohibitory law un-

less a license is obtained, and then the licensee is bound by stringent provisions, and himself and bondsmen made pecuniarily liable for any violation thereof. The design of the law was to prohibit the traffic unless at least thirty resident freeholders of the town or precinct should petition for license, and then, if license was granted, to regulate the traffic by placing it in the hands of respectable persons, with adequate indemnity for any violation of the conditions of the bond. But this does not preclude the power of the state to permit municipalities to impose an occupation tax on those engaged in the business. It is well known that the traffic produces destitution, misery, and crime, fills poor-houses and prisons, and adds largely to the burdens of tax payers in every municipality where license is granted. It would seem but justice that the business should bear at least a part of the burden, and no doubt this provision was retained in our constitution with this end in view.

The particular form in which this occupation tax may be imposed, whether by adding a penalty to it if not paid in a certain number of days, as in the case cited from Texas, or otherwise, is not material, so that its payment is not made a condition precedent to the issuing of the license. Whether such penalty could be enforced in this state is not now before us. We hold, therefore, that the city of Platts-mouth had authority to impose an occupation tax on saloon keepers, and that the finding of the referee that the \$3,500 was paid into the city treasury as an occupation tax is fully supported by the evidence. The writ will therefore be issued as prayed.

WRIT AWARDED.

THE other judges concur.

THE AULTMAN AND TAYLOR COMPANY, PLAINTIFF IN  
ERROR, V. CHARLES AND SUSAN JENKINS, DEFEND-  
ANTS IN ERROR.

1. **Homestead: MORTGAGE.** Under the homestead law of 1879 a mortgage on the homestead of a married person to be valid must be executed and acknowledged by both husband and wife.
2. ———: ———. A mortgage to secure an antecedent debt was signed by both husband and wife, and afterwards acknowledged by the wife before the proper officer, but not by the husband; *Held*, There being no countervailing equities, that the mortgage did not create a lien on the homestead.

ERROR to the district court for Richardson county. Tried below before MITCHELL, J., sitting for BROADY, J.

*Edwin Falloon*, for plaintiff in error, cited: *Watson v. Voorhees*, 14 Kan., 328. *Godfrey v. Thornton*, 1 N. W. R., 862. *Mulloy v. Ingalls*, 4 Neb., 115. *White v. Gilbert*, 10 Neb., 539. *Harrison v. McWhirtir*, 12 Neb., 152. *Tucker v. Allen*, 16 Kan., 812. *Jones v. Evans*, 7 Dana, 96. *Osterhout v. Shoemaker*, 3 Hill, 518. *Edgell v. Hagens*, 5 N. W. R., 186.

*A. Schoenheit*, for defendants in error.

MAXWELL, CH. J.

This action was brought by the plaintiff against the defendants to foreclose a certain mortgage upon real estate, which mortgage it is alleged in the petition was executed by the defendants upon their homestead. The defendants answer separately. Charles Jenkins, the husband, in his answer alleges that the mortgaged premises are a homestead and worth not to exceed \$1,000; that by reason of sickness he was not in his right mind when he signed the mortgage, and the same was procured by the misrepresent-

19	909
23	374
19	309
31	864
19	309
35	882
19	309
51	26
52	63

ation of the plaintiff's agent; that there was no consideration for the same, and "that defendant never acknowledged said mortgage before any officer."

Susan Jenkins, the wife, in her answer pleads want of consideration, etc. Both defendants pray for a cancellation of the mortgage.

On the trial of the cause the court made special findings, which, in the view we take of the case, need not be referred to here. The court rendered judgment for the defendants, and dismissed the action.

The testimony tends to show the following facts: That some time prior to Nov. 15th, 1883, the defendant, Charles Jenkins, in connection with one Hershey, purchased from the plaintiff a threshing machine. Certain payments had been made on the same, but at the time above stated there was a large balance due. An agent of the plaintiff at the date indicated called upon the defendant, and induced him to give three notes to the plaintiff as follows: One note for \$125, due March 1st, 1884; one note for \$250, due Nov. 1st, 1884, and one note for \$245, due Nov. 1st, 1885; and to secure these notes Jenkins and wife seem to have agreed to execute a mortgage on their homestead. This mortgage contains a provision that in case of default all the payments may be declared due, and an action instituted to foreclose. For several weeks prior to this time the defendant, Charles Jenkins, had been sick with typhoid fever or typhoid pneumonia—the witnesses disagree as to the disease—and was then quite unwell. There is no doubt that he was weak and emaciated, but he seems to have been in possession of his mental faculties. The plaintiff's agent prepared the notes and mortgage, and some effort was made on that day to procure an officer to take the acknowledgment of the defendants. No officer could be found, however, at that time, and the mortgage was left with the defendants, under the promise that they would acknowledge the same, and transmit it to the agent. On

the next day Susan Jenkins, the wife of Charles Jenkins, went before a justice of the peace, and acknowledged the execution of the mortgage, and stated that her husband's signature to the same was valid, but that he was unable to appear and acknowledge it. The justice thereupon, at her request, made a certificate of the acknowledgment of both husband and wife. The wife thereupon transmitted the mortgage to the plaintiff's agent. It was not in the possession of the defendant, Charles Jenkins, after the above acknowledgment.

Section 4 of the statute of 1881, relating to homesteads, provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Comp. St., ch. 36.

Deeds of real estate, or any interest therein in this state, except leases for one year or for a less time, must be signed by the grantor, being of lawful age, in the presence of at least one competent witness, who shall subscribe his name as a witness thereto, and be acknowledged or proved, etc.

The grantor must acknowledge the instrument to be his voluntary act and deed. The acknowledgment, if taken in this state, must be made before a judge, clerk of a court, justice of the peace, or notary public; but no officer can take any acknowledgment out of his territorial jurisdiction. Comp. St., ch. 73, §§ 2 and 3.

Acknowledgment is defined to be the act of one who has executed a deed in going before some competent officer or court, and declaring it to be his act or deed. 1 Bouv. Law Dict. (14 Ed.), 56. The statute, therefore, requires the husband and wife who incumber or convey the homestead to execute and acknowledge the deed or mortgage of the same. As between the parties, at least where there are no countervailing equities, this requirement is essential to the validity of the instrument. As all the testimony, even that of the justice before whom the alleged acknowledgment

purports to have been taken, shows that Charles Jenkins never acknowledged the mortgage, it is, therefore, invalid and of no effect. The plaintiff however paid the taxes upon the land in question for a time, and has a lien thereon for such taxes and interest, which the defendants must pay or the plaintiff may enforce the lien on the land. In all other respects the judgment of the district court is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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23 651  
24 605

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26 593  
19 212  
35 702

19 212  
42 345

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61 52

JOHN WEIR, PLAINTIFF IN ERROR, v. THE BURLINGTON  
AND MISSOURI RIVER RAILROAD COMPANY IN NE-  
BRASKA, DEFENDANT IN ERROR.

1. **Trial: OBJECTIONS TO INSTRUCTIONS.** Where objection is made to the ruling of a trial court in the giving or refusing to give instructions to the jury hearing the cause, the instructions given or refused must be pointed out in the motion for a new trial in some way, either by number or other means of identifying the same.
2. **Error must appear affirmatively.** A judgment of the district court will not be reversed unless the errors alleged and complained of appear on the record affirmatively.

ERROR to the district court for Lancaster county. Tried below before GASLIN, J., sitting for POUND, J.

*Cornish & Tibbetts*, for plaintiff in error.

*Marquett, Dewees & Hall*, for defendant in error.

REESE, J.

This action was brought by plaintiff to recover damages for the depreciation in the value of his residence property



by reason of the construction and operation of a railroad track in the street upon which the property abutted. There is no bill of exceptions, and the cause is presented upon the record, consisting of the pleadings, instructions to the jury, verdict, and judgment. The motion for a new trial assigned a number of grounds or reasons why the verdict of the jury should be set aside, but as many of them involved admission or rejection of evidence, or other grounds which would require an examination of the proceedings at the trial, we, of course, cannot inquire into them for want of a bill of exceptions.

There are two grounds which it is insisted may be examined by the light of the record we have. They are as follows:

"The court erred in refusing the instructions to the jury asked by plaintiff, which refusal was duly excepted to by plaintiff."

"The court erred in each and every instruction given to the jury, and instructions were excepted to by plaintiff."

Three of the instructions asked by plaintiff were refused. Twelve instructions were given, some of which were upon the court's own motion, and some upon the request of defendant. There is nothing in the motion for a new trial nor in the petition in error which in any way designates the instructions refused nor those given, of which complaint is made.

In *Hastings and Grand Island R. R. Co. v. Ingalls*, 15 Neb., 129, the present Chief Justice, MAXWELL, in writing the opinion, says: "There is good reason for allowing a general assignment of all errors arising from objection to the admission or rejection of testimony, as it is frequently almost impossible to point out all such errors in the motion for a new trial. But no such difficulty arises in regard to instructions. The statute requires them to be given in consecutively numbered paragraphs, and provides that they may be excepted to without assigning a reason therefor.

One of the objects of the statute was to enable a party objecting to an instruction to bring it to the attention of the court by number and thus avoid the inconvenience of copying the same, \* \* \* It is but justice to the trial court that objections to instructions be pointed out, and in our opinion the statute has not changed that requirement."

Applying the above rule to this case it is clear that plaintiff in error has not presented any questions here which we can review. We have examined the instructions given as well as those refused. They are lengthy, and it could serve no good purpose to copy them here at length. It is sufficient to say that *some* of those given do not misstate the law, and that some of those refused were rightfully rejected.

It is alleged in the petition in error that the cause was taken under advisement by the court to await the decision by this court of the case of *Hastings & Grand Island R. R. Co. v. Ingalls*, *supra*, and that if that case "should be decided adversely to the railroad company, then the motion for a new trial should be granted, and with the request of the plaintiff not to take other and further steps necessary to obtain a new trial, which agreement and request on the part of the court plaintiffs in good faith acceded to and complied with, but the court failed to decide the motion in accordance therewith, the decision in the above case having been rendered in favor of Ingalls." The record shows that this cause was "taken under advisement until decision of the supreme court in case of *St. Joseph & Grand Island Railroad Co. v. Ingalls*," but it does not show the agreement as alleged. Of course we must look to the record alone. It is to be deplored if the rights of plaintiffs, if any, are lost by any misunderstanding between the trial court and counsel, but this court cannot assume to pass upon questions not shown by the record. A judgment cannot be reversed unless error affirmatively appears from the record. *Hamilton County v. Baily*, 12 Neb., 57. *Stephen-*

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Woodworth v. Hammond.

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*son v. Anderson*, Id., 86. If the record is imperfect, so the court cannot tell whether facts assigned for error exist or not, the judgment of the court below will be affirmed. *Cunningham v. Tonnemaker*, 13 Neb., 462.

No error appearing by the record the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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LUCIAN WOODWORTH, PLAINTIFF IN ERROR, V. AARON HAMMOND, DEFENDANT IN ERROR.

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59	145

1. **Contract to Dig Well: CONDITIONS: WAIVER.** H. and W. entered into a written contract by which H. agreed to dig a well for W., the compensation to depend upon the quantity of water produced, the measurements to be made in the manner provided for in the contract. The well was completed and the water measured by H., but not in strict compliance with the method provided for in the contract. W. was not present at such measurement. He made no measurements himself and never sought to have any made. The measurements made by H. showed that the quantity of water secured was equal to the amount required by the contract. *Held*, That the failure of W. to procure any measurements to be made was a waiver of that part of the contract and that the fact that the measurement was not made in strict compliance with the contract did not of itself constitute a defense.
2. ———: ———: **VERDICT.** In such case the testimony showing a substantial compliance with the contract, the requisite quantity of water being secured, a verdict of the jury in favor of H. will not be disturbed.

ERROR to the district court for Douglas county. Tried before WAKELEY, J.

*Redick & Redick*, for plaintiff in error.

*W. J. Connell*, for defendant in error.

REESE, J.

This action was upon a written contract for digging a well. The plaintiff below alleged in his petition, substantially, that on July 11, 1876, plaintiff and defendant entered into a written contract as follows:

"A. Hammond, of Jacksonville, Illinois, hereby agrees to locate, sink, and curb a well for L. Woodworth, on his place in South Omaha, within less than twenty feet of where he has already sunk, guaranteeing five hundred gallons of water in twenty-four hours, for which, said L. Woodworth covenants and agrees to pay said A. Hammond or his order six dollars for each and every one hundred gallons of water said well is capable of and shall supply in twenty-four hours, the supply to be ascertained by first taking out all the water from said well and to continue to take it out as fast as it runs into said well for three hours, that ratio to be the amount of twenty-four hours' supply, which is to be paid for on the completion of said Hammond's part of the contract, said well not to exceed two hundred and fifty dollars.

"Signed,

L. WOODWORTH.

"Witness,

A. HAMMOND."

"For description and other provisions of contract see the other side."

On which other side appears the following:

"And said L. Woodworth further agrees to furnish all the necessary curbing at the well free of charge, and said Hammond also agrees that if said well supplies more than 500 gallons of water in twenty-four hours, then said Woodworth is to pay \$2.00 per one hundred gallons for what it may supply, said amount not to exceed two hundred and fifty (250) dollars.

"Signed

L. WOODWORTH.

"A. HAMMOND."

That the plaintiff did locate, sink, and properly curb said well and fully complete it April 8, 1877; that said well is capable of supplying upwards of 15,000 gallons in twenty-four hours; that the defendant though often requested has not paid the amount due, and praying judgment for \$250 and interest.

The defendant (plaintiff in error here) filed his answer, setting up his defenses as follows: Denying each and every allegation in petition except those admitted. That he signed said contract, but that plaintiff delayed commencing work so long that the defendant suffered great damage; that in settlement of said damages, and before any work was done, plaintiff and defendant entered into another and different agreement as follows: That the contract set out in petition be canceled, and plaintiff would go into a well that defendant then had, about 110 feet deep, and at the depth of forty feet from the surface, tunnel across and procure him a sufficient quantity of water, using the old well as a reservoir; that the well should produce at least 15,000 gallons of water in twenty-four hours from the vein struck by said tunnel; that plaintiff would brick it up and complete it and receive \$200 for the same. That the plaintiff did not commence within a reasonable time nor until six months thereafter, and defendant was obliged to haul water at an expense of \$75, which he sets up as a counter-claim; that in March, 1877, plaintiff commenced sinking defendant's old well deeper, struck a little water and abandoned it; afterwards plaintiff dug a few feet deeper and procured two and a half or three feet of water, but not sufficient for defendant's use. He denies that plaintiff has complied with the condition of his contract, but wasted and destroyed lumber to the amount of fifty dollars, and put defendant to extra expense of fifty dollars; defendant paid twenty-five dollars on said contract; that plaintiff has no interest in the suit, and that he is not indebted to said plaintiff and prays judgment against the plaintiff for \$225 and costs.

Plaintiff for reply denied all the allegations of the answer.

There was a jury trial resulting in a verdict and judgment in favor of the plaintiff in the action for \$244. The defendant, as plaintiff in error, brings the cause to this court, alleging that the verdict is not supported by sufficient evidence.

By the terms of the contract the price to be paid was made to depend upon the quantity of water secured; this to be ascertained by certain tests or methods of measurement prescribed therein. The proof did not sustain the allegation of the answer that the contract was abandoned, but rather that plaintiff in error had a well of considerable depth which had been abandoned, and by his consent defendant in error dug this well down until water was reached. The work was not prosecuted with vigor and the well was not completed until in the spring of 1877. But to this no particular objection appears to have been made, and must now be considered as waived. The real question is, whether or not, by the tests shown to have been made, the amount found by the verdict was greater than the quantity of water found would justify. It appears from the testimony that no test or measurement of the water was made by both parties, as seems to be implied by the contract, but that all efforts in that direction were made by defendant in error or others in his interest or at his request. No measurement is shown to have been made by plaintiff in error, either in accordance with the contract or otherwise. As he seems not to have insisted upon or cared to have the measurement made in strict accordance with the contract, we do not think he can now insist upon a defense based upon that fact alone, since it is shown that three measurements were made by defendant in error. The question, then, of the *method* of measurement must be considered as waived and out of the case, and the verdict must be tested by the testimony showing the quantity

of water secured. The defendant in error testified that the second test or measurement made by him was in company with Mr. Redfield, and with four men at the windlass the water was lowered six inches after an hour's work, and that at the rate shown by this test the well would supply twelve thousand six hundred gallons of water. J. B. Redfield testified that he was present at this test. He says: "Three, four, or five of us tested it and drew the bucket up four times altogether, which took seventeen or eighteen minutes in round numbers. It lowered the water at last test an inch or two, filled up again to the level in ten or fifteen minutes. L. C. Redfield was also present. He says: "Hammond had a large iron bucket twenty-five inches deep, eighteen to twenty inches across, valve in bottom. When the bucket struck water it would settle immediately and valve would close when we pulled—four men on windlass—found height of water before and after test, lowered ten or twelve inches first test, second time a little over an inch—inch came back in ten or twelve minutes."

S. Jacobson testified: "I tested the well three hours one day with ten gallon bucket, would draw a bucket up every three minutes, and continued that for three hours; did not lower the water any; measured it before and after test and no difference—four feet of water. Notified Woodworth; went to see him about brick; he said there was not water enough; I said I was willing to test it any day." This test seems to have been made before the well was finally completed. It does not seem to have been a very reliable one, as at the rate the water was taken out it would yield only 4,800 gallons in twenty-four hours; but as the quantity of water was not diminished it affords no criterion as to the producing capacity of the well above the 4,800 gallons. Hammond and Jacobson were interested parties. The Redfields appear not to have been. Assuming, as we must do, in support of this verdict, that the jury did not allow any damages to plaintiff in error, and adopting the

measurement as testified to by the Redfields and as estimated in the brief of plaintiff in error, we find that upon the testimony of J. B. Redfield, after deducting the \$25 paid and adding interest, the verdict would have been about \$254. By the testimony of L. C. Redfield, by the same rules, it would have been about \$240. Applying the same rule to the same test as testified to by Hammond, the verdict would have been much more. It therefore follows that the verdict, so far as these tests are concerned, is supported by the evidence.

It is claimed by defendant in error that certain instructions given to the jury by the court were erroneous, but the view we take of the case renders these objections unimportant, as they are virtually disposed of by the foregoing.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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THE STATE OF NEBRASKA, EX REL. JOHN A. LUCAS, v.  
JULIUS THIELE.

1. **Supersedeas Bond: CONDITIONS.** When a decree of foreclosure of mortgage is rendered in the district court and the amount of the supersedeas bond for appeal to the supreme court is fixed by the district court, such bond in order to act as a supersedeas, when filed and approved, must contain the conditions prescribed by law, otherwise it is the duty of the clerk of the court rendering the decree to issue order of sale on demand and payment or tender of fees.
2. ———: **MANDAMUS.** In such case, where the clerk refuses to issue order of sale, a mandamus will issue to compel action.
3. ———: **AMENDMENT.** The filing of a supersedeas bond is a proceeding within the meaning of section 144 of the civil code, and may be amended.

19	320
29	123
19	220
40	446
19	220
45	13
19	220
50	170



ORIGINAL application for mandamus.

*H. L. Brome* and *C. C. McNish*, for relator.

*M. McLaughlin*, for respondent.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus, requiring the defendant, the clerk of the district court of Cuming county, to issue an order of sale upon a decree of foreclosure of a mortgage rendered in that court. The defendant in that action, desiring to remove the cause into the supreme court for review, caused the necessary transcript to be made and filed the same with the clerk of this court, and executed and filed with defendant a bond which was intended to perform the service of a supersedeas under the provisions of section 677 of the civil code. The condition of the bond is as follows :

“ Now, therefore, we, Risdin P. Hinkinson, as principal, and J. B. Hankinson, H. N. Warren, and J. W. McLaughlin, as sureties, do hereby undertake to the said John A. Lucas in the sum of five hundred dollars that the said Risdin B. Hinkinson shall abide the judgment and decree, if the same shall be affirmed, and pay the costs.” The bond was approved by the respondent.

The relator being dissatisfied with the bond as to form and substance demanded the issuance of an order of sale, notwithstanding the bond, and tendered the legal fees therefor. But respondent refused to issue the order.

Without quoting at length, it may be said that, as applicable to this case, the section of the code above cited provides that no appeal in any case in equity shall operate as a supersedeas unless the appellant shall, within twenty days next after the rendition of the decree, execute to the adverse

party a bond with one or more sureties, conditioned that the appellant "will prosecute such appeal without delay, and will not during such appeal commit or suffer to be committed any waste upon such real estate."

As will be seen by the condition of the bond above given, the clause above quoted from the statute is wholly omitted. The purpose of the legislature evidently was that in case of the foreclosure of liens the value of the real estate should not be diminished after the decree and during the pendency of the appeal by the commission of waste, thereby lessening the security. The bond was insufficient in substance and should not have been approved. It was therefore the duty of respondent to issue the order of sale when requested so to do by the relator. That being his duty a mandamus will issue to compel action. Sec. 645, civil code.

It is insisted that the giving of the bond is a proceeding of the kind referred to in section 144 of the civil code, which may be amended, and therefore relief should be sought within the district court or in this court by motion or otherwise attacking the bond.

There is no doubt but that the bond might be amended so as to conform to the requirements of the law at any time, but the fact still remains that the bond is not in conformity to the law, and it is the duty of the clerk to issue the order unless such bond is filed.

The judgment is that a peremptory writ of mandamus be allowed requiring the respondent to issue the order of sale as requested unless an amended bond, to be approved by respondent, be filed in compliance with law within twenty days. In case it is certified to this court that such amended bond has been filed within the time specified no writ will issue.

**JUDGMENT ACCORDINGLY.**

**The other judges concur.**

THE STATE OF NEBRASKA, EX REL. THE CITY OF  
LINCOLN, v. H. A. BABCOCK, AUDITOR OF PUBLIC  
ACCOUNTS.

19 223  
19 236  
22 195

1. **Municipal Corporation: AID TO INTERNAL IMPROVEMENTS.** A city of the second class may make donations to railroads or other works of internal improvement in an amount in the aggregate not to exceed ten per cent of the assessed valuation, and bonds issued for water-works which the city owns, and for other city purposes, cannot be computed as a part of such ten per cent.
2. ———: ———: **CERTIFICATION.** Bonds issued by a city as a donation to a railroad must have the certificate of the secretary and auditor of state indorsed thereon, and if such bonds do not have such certificate such officers will not be required to certify refunding bonds based on such prior bonds.

ORIGINAL application for mandamus.

*J. R. Webster and Allen W. Field*, for relator.

*William Leese, Attorney General* (*C. O. Whedon* with him), for respondent.

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendants to certify \$25,000 of refunding bonds issued by the relator. It is alleged in the petition that, "under the provisions of the statutes for the issue of bonds by counties, towns, cities, and precincts in aid of works of internal improvements, the city of Lincoln, pursuant to regular proceedings for the calling of an election and submission of the proposition to the electors of said city, voted to issue and did issue to the Lincoln and Northwestern Railroad Company, a railroad corporation of this state, its bonds in the sum of twenty-five thousand dollars, with interest payable annually at the rate of eight per centum per

annum, which bonds were dated the first day of January, 1880, and were payable absolutely the first day of January, 1900, and at the option of the said city at any time after January 1st, 1885, and were issued to aid said railroad company in the construction of its road from said city of Lincoln to the city of Columbus in the state of Nebraska.

The said Lincoln and Northwestern Railroad Company duly constructed its line of road so to be constructed, and said bonds were to it duly issued and placed upon the market and sold, and ever since said city has paid interest upon said railroad bonds as it accrued and matured, and no question has ever been made as to the validity of said bonds as the obligation of said city.

5th. Prior to the first day of July, 1885, the city of Lincoln exercised its option to pay said bonds before maturity, and called said bonds for presentation and payment July 1st, 1885, and the holders of said bonds presented the same for payment in response to such call, and the same now await payment as overdue obligations of said city.

6th. Not having the necessary funds with which to pay such bonds so called after two futile attempts to issue and sell bonds with which to meet its said call, by submission of the question to the electors of said city, both of which were ratified by the electors at elections duly held, the parties purchasing said new bonds signified to the mayor and council a preference to have such refunding bonds issued by authority of the mayor and council of said city, and the authority of the mayor and council of said city under an ordinance of said city and the authority conferred by sections eleven, twelve, and thirteen of chapter forty-five of the Compiled Statutes.

7th. Accordingly, and on the sixteenth day of November, 1884, after due proceedings in compliance with sections eleven, twelve, and thirteen of chapter forty-five of the Compiled Statutes of Nebraska, the mayor and council of said city by ordinance of that date duly authorized the

execution and issue of twenty-five bonds of one thousand dollars each, payable in twenty years and redeemable in five years from their date, to bear date December 20th, 1880, and to bear interest at the rate of five and one-half per centum per annum, payable semi-annually in the city of New York, which bonds said city sold at par and negotiated to Lewis and Lewis, who were the best bidders therefor and who are now ready and willing to pay therefor at par as soon as said bonds can be registered and their validity established.

8th. All proceedings relative to the passage of said ordinance and issue of said bonds were, on the nineteenth day of January, 1886, duly presented to and filed with the respondents, and the fees for the registration of said bonds, but the respondents refused to register the same. Copies of the proceeding for issue of said new bonds so required to be registered and for the issue of said former bonds so to be redeemed filed with the respondent, and are hereto annexed and made a part of this application.

10th. In consequence of the refusal of respondents to register said bonds the relator is unable to complete and effect its negotiation for call and redemption of its 8 per cent bonds, or to effect and complete the issue of its lower interest,  $5\frac{1}{2}$  per cent bond, greatly to the detriment of its credit and revenue.

11th. The only reason that the respondents have for their refusal to register said new refunding bonds, as relator is advised, is, that heretofore, prior to the issue of \$25,000 of bonds to aid said Lincoln and Northwestern Railroad Co., said city issued bonds for the following amounts and purposes, which, on the 21st day of December, 1880, were still outstanding, viz.:

Internal improvements.

Atchison and Nebraska R. R. Co., 1872.....	\$ 9,500
Lincoln & Northwestern R. R. Co., 1880.....	25,000

Total for internal improvement .....	\$34,500
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## Other purposes.

To protect city from fire, 1872, under charter of 1871 .....	\$ 20,000
To protect city from fire, 1874, under charter of 1871 .....	1,200
To fund floating debt, 1872, under charter of 1871.	30,000
To fund floating debt, 1875, under charter of 1871.	53,000
To build iron bridge within city, 1873, under charter of 1871.....	2,000
<b>Total under charter.....</b>	<b>\$106,200</b>
<b>Total for internal improvements.....</b>	<b>34,500</b>
<b>Debt including total issue Lincoln and Northwestern .....</b>	<b>\$140,700</b>

12th. The assessed valuation of said city at date of such issue of \$25,000 of bonds to the Lincoln and Northwestern Railroad Co. was \$1,236,661, and under the internal improvement act it had power to issue bonds to the amount of \$123,560 for such purpose, and had only issued, including said bonds, the sum of \$34,500.

13th. But respondents insist that all indebtedness of said city shall be computed (by terms and provisions of the act to provide for funding warrants and outstanding indebtedness of counties, page 219, acts of 1877) in determining the validity of said \$25,000 issued to the Lincoln and Northwestern R. R. Co., and that such issue was in excess of the powers of said city, which questions whether or not all indebtedness shall be computed in determining the amount the city may issue for aid of works of internal improvements, and second, whether under the act for refunding outstanding bonds, 11, 12, and 13, chapter 45 of Compiled Statutes, all outstanding bonds shall be computed in determining the validity of such refunding bonds, and then their registerable character are the sole questions involved in this controversy. The relator, however, further

## State v. Babcock.

shows that the outstanding obligations of said city now outstanding with date and purpose of issue are as follows, to-wit:

Funding bonds 1872, to fund outstanding indebtedness .....	\$ 30,000 00
Funding bonds 1875, to fund outstanding indebtedness .....	53,000 00
To Northwestern R. R. bonds in aid construction said road, for refunding which these bonds are issued.....	25,000 00
Water bonds 1882, 1st series.....	10,000 00
Funding bonds 1882, to refund fire bonds....	20,000 00
Water bonds 1884, 2d series.....	10,000 00
Water bonds 1884, 3d series.....	90,000 00
<b>Total.....</b>	<b>\$238,000 00</b>

Wherefore relator prays the issue of a peremptory writ of mandamus directed to H. A. Babcock, auditor of public accounts, and Edward P. Roggen, secretary of the state of Nebraska, that they certify and register said twenty-five bonds of the city of Lincoln, dated December 20th, 1885, of \$1,000 each, bearing interest payable in the city of New York semi-annually at the rate of five and one half per cent per annum, payable after five years at the option of said city, and due in twenty years from this date."

There is also a stipulation in the record as follows: "It is hereby agreed by and between the parties hereto that the bonds issued to said Lincoln and Northwestern Railroad Company, dated the first day of January, 1880, and referred to in the application of the relator, were never registered by the auditor of public accounts, nor did said bonds or any of them ever have endorsed thereon a certificate signed by the secretary and auditor of state showing that said bonds were issued pursuant to law. This stipulation shall be considered as a part of the application for a writ of mandamus in this proceeding, and to said application as

amended by this stipulation respondents shall file a general demurrer."

The case was submitted on demurrer to the petition.

The first question presented is the authority of the city to issue bonds for the purpose indicated.

Sec. 2, art. 12 of the constitution provides that, "No city, county, town, precinct, municipality, or other subdivision of the state, shall ever make *donations* to any railroad or other work of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law; *Provided*, That such donations of a county with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county; *Provided further*, That any city or county may by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent, and no bonds or evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state showing that the same is issued pursuant to law."

It will be seen that *donations* to railroads or other works of internal improvement are limited to ten per cent of the assessed valuation, unless by a two-thirds vote five per cent additional is given.

The question as to what constitutes internal improvements has been decided by the court in a number of cases—*U. P. R. R. v. Commissioners of Colfax Co.*, 4 Neb., 450. *S. P. L. Co. v. Buffalo Co.*, 7 Id., 253. *Traver v. Merrick Co.*, 14 Id., 327—and need not further be considered. It is evident that bonds issued for the construction of waterworks to be owned by the city, or for debts of the city, do not come within the prohibition of the constitution—the limitation of ten per cent. This objection, therefore, is untenable.

2d. That said bonds "were never registered by the



auditor of public accounts, not did said bonds or any of them have endorsed thereon a certificate signed by the secretary and auditor of state showing that they were issued pursuant to law."

It was claimed on behalf of the city on the argument that the refunding bonds were merely a continuation of the original bonds, and that therefore it was unnecessary to register or have certified the original bonds which the refunding bonds were intended to take the place of. It was also contended by one of the attorneys that appeared for an intervenor that the requirement in sec. 2, art. 12 of the constitution, for the certification of bonds, applied only to the five per cent issued on a two-thirds vote in addition to ten per cent previously issued.

In answer to the first of these objections it is sufficient to say that the refunding bonds, though issued to take the place of the original bonds as representing the same debt, yet must be based upon bonds previously duly issued and certified. There is a plain provision of the constitution applicable to bonds issued as donations for railroads and other works of internal improvement, and neither the city nor the defendants can disregard it with impunity. Who is to blame for the failure to have such bonds properly certified does not appear, but until so certified it was the duty of the defendants to refuse to certify refunding bonds to take their place.

The second question is not free from difficulty because of the punctuation of the original section in the engrossed copy of the constitution, a period being placed before each of the *provisos*. While the punctuation might perhaps justify the construction that only the additional five per cent in excess of ten per cent was to be certified, yet it is evident that both the ten per cent and five per cent additional were intended, the language being that "no bonds or evidences of indebtedness *so issued* shall be valid unless," etc. That is, that all bonds or evidences of indebtedness

issued for the purposes designated must be certified as provided in the constitution. As the bonds which it was sought to refund in this case did not contain the certificate required by the constitution, it was the duty of the defendants to refuse to certify refunding bonds based thereon. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

19 230  
29 125

THE STATE OF NEBRASKA, EX REL. THE CITY OF  
LINCOLN, V. H. A. BABCOCK, AUDITOR OF PUBLIC  
ACCOUNTS.

1. **Municipal Corporations: AID TO INTERNAL IMPROVEMENTS.** A city has authority under the statute to donate to one or more railroads or other works of internal improvement its bonds not to exceed in the aggregate ten per cent of the assessed valuation; and bonds issued for water-works owned by the city or other city purposes are not to be computed in making up the aggregate which the city may donate.
2. ———: ———: **STATUTORY AUTHORITY.** The authority for a city to issue bonds to aid in the construction of railroads or other works of internal improvements is expressly conferred by sec. 1, chapter 45, Compiled Statutes.
3. ———: ———: ———. The word "aid" as used in the statute may include donations.
4. ———: ———: **DUTY OF AUDITOR AND SECRETARY OF STATE.** The provision in the constitution requiring the secretary and auditor of state to endorse on bonds issued as a donation to a railroad or other work of internal improvement, that such bonds were "issued pursuant to law," requires no legislation to carry it into effect, but it is the duty of such officers in a proper case to make such endorsement.
5. ———: ———: ———. The provision applies to all bonds issued for that purpose, and not alone to the five per cent in excess of the ten per cent first issued.

6. ———: ———: MANDAMUS. Sec. 31, chapter 9, Compiled Statutes, authorizes a city in a proper case to institute a proceeding to compel the certification of bonds issued by such city.

ORIGINAL application for mandamus.

*Allen W. Field* (*James M. Woolworth* and *J. R. Webster* with him), for relator.

*William Leese, Attorney General* (*Mason & Whedon* with him), for respondent.

MAXWELL, CH. J.

This is an application for a mandamus against the secretary of state and auditor to compel them to register "and under their seal of office certify upon" bonds to the amount of \$50,000 issued as a donation to the Missouri Pacific Railway, "that they have been regularly and legally issued," etc. The relator alleges in its petition that,

"3d. Prior to the 10th day of October, 1885, in due conformity to law, the relator, the city of Lincoln, had issued its bonds in aid of the construction of works of internal improvement, as follows:

In 1872, to the Atchison & Nebraska Railroad

Company.....\$ 9,500

In 1880, to the Lincoln & Northwestern Railroad

Company.....\$25,000

Which were issued by said city in aid of works of internal improvement, and amount to.....\$34,500

"4th. On the 10th day of October, 1885, the assessed valuation of all taxable property in the city of Lincoln amounted to the sum of \$2,183,030, as the same was assessed and returned at the time of the assessments in April and May of the year 1884 for revenue purposes.

"5th. On the 7th day of September, A.D. 1885, the mayor and council of said city of Lincoln duly passed an ordinance calling a special election in said city of Lin-

coln, to be held on the 10th day of October, 1885, for the purpose of taking the vote of the electors of said city upon a proposition to them submitted, to issue and donate to the Missouri Pacific Railway Company the bonds of said city of Lincoln to the amount \$50,000, dated November 1st, 1885, payable twenty years thereafter, with interest from the 1st day of January, 1886, at the rate of five per cent per annum, payable semi-annually, interest and principal payable at the bank of Kountz Brothers in the city of New York, to aid said Missouri Pacific Railroad Company in the construction of its road from its main line in Cass county to said city of Lincoln.

"6th. Said proposition was conditioned that said railway company should construct a first-class railroad of standard gauge into said city of Lincoln, connected with the main line of said company already constructed, so that continuous trains might be run thereon from its main line into said city; that said company should begin active construction of said road within thirty days from the date of election and declaration of the adoption of the proposition, and complete said railroad, with a necessary depot for freight and passengers at said city, and other appurtenances; and run regular trains thereon from its already constructed line in this state into said city of Lincoln by the first day of September, 1886.

"7th. By said proposition it was also provided that thirty days after the active work of constructing said railroad should have begun, said bonds should be executed and deposited in the hands of a trustee, to be appointed by the mayor of said city, to hold in trust for said company and for said city, to be delivered to said company if it should comply with the conditions aforesaid, otherwise to be returned to said city to be canceled.

"8th. Said ordinance was duly approved and was published as required by law for four weeks continuously in the *Nebraska State Journal*, a weekly newspaper published

in said city, commencing the 10th day of September, 1885; and such election was duly and regularly held the 10th day of October, 1885, and on the 12th day of October, 1885, the returns of said election were by the mayor and council of said city of Lincoln duly canvassed, and the vote of the electors cast found and declared to be, in favor of said proposition, 1799 votes; against said proposition, 56 votes; and more than two-thirds of the votes cast being in favor of said proposition. The result was thereupon, by the mayor and council of said city, declared to be that said proposition was adopted, and the proposition and result was entered upon the records of said city of Lincoln, and notice of its adoption was published in said weekly newspaper, the *Nebraska State Journal*, as required by law, for two weeks continuously prior to the issue of said bonds.

"9th. The Missouri Pacific Railway Company on its part accepted the result so declared, and entered upon the active construction of its railway on or about the 8th day of November, A.D. 1885, and within less than thirty days after said election, and has completed and laid about two miles of its road ready for the passage of rolling stock, engines, and cars, and has acquired by purchase a large amount of real estate in fee simple for depot grounds, for which real estate so purchased it has paid out the sum of eighty thousand dollars, and is now engaged in acquiring, partly by purchase and partly by condemnation, grounds for depots, side tracks, yard, and appurtenant uses, tracts of grounds aggregating fifty-one acres in and adjacent to said city, having to this time fully complied with all the terms and conditions of said proposition on its part to be performed.

"10th. Pursuant to said proposition and the facts aforesaid, thirty days after actual work of construction of said railroad had been commenced, by order of the mayor and council of said city, the mayor and clerk of said city proceeded to sign and execute said bonds, and the mayor of said city named and designated the First National Bank,

of Lincoln, Nebraska, as trustee to receive and hold the same under the terms of said ordinance and proposition so adopted by the electors, and thereupon, before delivering said bonds to said trustee, the relator applied to the respondents, H. A. Babcock, auditor of public accounts, and Edward P. Roggen, secretary of the state of Nebraska, under the provisions of "An act to provide for the registration by the auditor of public accounts of bonds issued by villages and cities of the second class," approved March 5th, 1885, for the registration of said bonds, and requested that they certify upon said bonds that they have been regularly issued and registered in the office of the auditor of public accounts, and furnished to said auditor a transcript of all the proceedings had previous to the issuance of said bonds relative thereto, duly certified under the hand of R. C. Manley, city clerk of said city, authenticated by the seal of said city, and offered to pay said auditor the legal fees therefor, but the registration of said bonds was by the respondents refused.

"11th. Relator further shows that, so far as it is advised, the reason wherefor said respondents refuse to register said bonds, as they claim, that the said issue is excessive in amount and is in excess of the power of said city to issue bonds, because, as respondents claim, the city of Lincoln has no power to issue bonds for aid of works of internal improvement exceeding, together with outstanding bonds for whatsoever purposes issued, the amount of ten per centum of the assessed valuation of said city, and that the outstanding obligations of said city, together with the proposed 50,000 (thousand) dollars of bonds, exceed the sum of \$218,303.

"13th. But relator shows all its outstanding bond obligations of every character unpaid the 10th day of October, 1885, or November 1st, 1885, together with the year and the purpose of their issue, were and are as follows:

## State v. Babcock.

For aid of works of internal improvement above stated.....	\$ 84,500
For protection from fire (fire apparatus, etc.), charter of 1871 in 1872.....	\$ 20,000
To fund floating debt deficit of general revenue charter of 1871 in 1872	30,000
To fund floating debt deficit of general revenue charter of 1871 in 1875	53,000
For construction of water-works and water supply charter of 1883 in 1882 and 1884, the water-works being property of said city.....	110,000
	<u>\$218,000</u>
Total indebtedness.....	<u>\$247,500</u>

"And relator contends that such indebtedness of \$218,000 is not chargeable under the law and statute in such case provided against the power of said city to issue bonds in aid of works of internal improvement, which question, so far as relator is advised, is the sole question involved in this controversy.

"Wherefore the relator prays the court the issue of a peremptory writ of mandamus, directed to H. A. Babcock, auditor of public accounts, and Edward P. Roggen, secretary of state of the state of Nebraska, commanding them that they forthwith register and, under the seal of their office, certify upon said bonds that they have been regularly and legally issued, and that they have been registered in the office of the auditor of public accounts, in accordance with the provisions of law."

The defendants filed an answer to the petition, and there is also a stipulation in the record as to certain facts.

As we understand the position of the defendants, they are ready and willing to certify the bonds in question if it is clear that it is their duty so to do; but they are in doubt, because of the various and apparently conflicting provisions

of statute relating to the subject, as to their duty in the premises, and ask the direction of the court.

The first question presented is the amount of bonds or other evidences of indebtedness which a city may issue as the aggregate of donations to a railroad or railroads, or other works of internal improvement.

Sec. 2, art. 12 of the constitution was copied in the opinion in *State v. Babcock*, heretofore filed, and need not be set out at length here. It will be observed that the restriction is upon *donations*—that is, that a city or county cannot, in the first instance, make a donation or donations for the purpose indicated which, in the aggregate, shall exceed ten per cent of the assessed valuation, with the further limitation that the legislature might authorize a municipality, by a two-thirds vote, to increase its donations five per cent. Bonds issued by a city for water-works which are owned by such city are in no sense donations, and are not to be included in the aggregate of evidences of indebtedness donated or to be donated to railroads or other works of internal improvements, and the same rule applies to other bonds issued for city purposes.

Some objection is made as to the right of a city to issue its bonds or other evidences of indebtedness because of the limitation upon a *county* that its donations “with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county.”

The question as to the effect of this limitation upon county donations is not before the court, and will not be considered; but it is clear that it does not apply to a city, it being expressly excepted under the second proviso; that is, a city, in a proper case, may issue *its* bonds to the amount of ten per cent to aid in the construction of works of internal improvement; nor does the limitation apply to a precinct. *State v. Lancaster County*, 6 Neb., 214. *Jones v. Hurlburt*, 13 Id., 131. As the bonds heretofore issued, with those now sought to be certified, will not amount to



ten per cent, they do not prevent the city from making the donation in question.

2d. That Lincoln, being a city of the second class and having more than five thousand inhabitants, it has no authority, under the act creating it, to issue these or any other bonds of like character. Without making a critical examination of the act referred to, we find the authority expressly conferred by section one, chap. 45, Comp. St., which is as follows: "That *any* county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad or other work of internal improvement to an amount to be determined by the county commissioners of such county, or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city; *Provided*, The county commissioners, or city council, shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the state of Nebraska, for submitting to the people of a county the question of borrowing money." This act was passed in 1869. It was not passed as a special act applicable alone to the counties or cities then in existence, but is general in its application, and confers authority upon any city or county to submit to the electors of the county or city the question of issuing bonds in a specified amount to aid in the construction of any railroad or other work of internal improvement. If, therefore, as contended, the charter of the city of Lincoln does not confer authority to donate the bonds of the city still such authority is granted by the general law, and the maxim *expressio unius est exclusio alterius* does not apply.

Objection is made that the power to vote bonds is to aid in the construction of railroads or other works of internal improvement. This question was very fully considered in *U. P. R. R. v. Commissioners of Colfax Co.*, 4 Neb., 450. The evident object of the statute was to enable a county

or city to avail itself of some proffered benefit of the character named in the statute by aiding or assisting the enterprise. From the nature of the case no narrow technical construction can or should be placed upon the word.

In *U. P. R. R. v. Commissioners, supra*, it was contended with great force that it was to be restricted to donations alone; but this court refused to give it such a narrow construction, but held that the statute applied where the funds were to be expended in a work of internal improvement constructed by the county. It may include donations and also works of internal improvement constructed by the municipality in part from bonds voted to aid the enterprise. This was the evident intention of the legislature, and the statute should be so construed as to carry such intent into effect.

Objections are made to the form of submission of the question, and also to the designation of a bank as trustee, but as no particular defect or want of authority is pointed out, they need not be considered.

3d. One of the objections urged with great force in the argument of the case was, that the provision of section 2, art. 12 of the constitution, which declares that "no bonds or other evidences of indebtedness so issued shall be valid unless the same shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law," was not self-operating, but required legislation to carry it into effect, and it was claimed that there being no such legislation the provision remained in abeyance.

No question arises at this time as to the purpose and effect of this provision, but merely as to the necessity for such certificate. Judge Cooley, in his work on Constitutional Limitations, quotes the following with approval: "This, then, is the office of a written constitution; to delegate to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers according to their na-

ture, and to commit them to separate agents; to provide for the choice of these agents of the people; to ascertain, limit, and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives."—E. P. Hurlbut, in *Human Rights and Their Political Guarantees*.

Webster, in his speech on the Independence of the Judiciary, vol. 3, page 26, says: "It cannot be denied that one great object of written constitutions is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect."

It is conceded in this case that if the constitution directed the officers named to certify the obligations in question that no legislation would be required to make it their duty to certify the same. But we find similar language used in other provisions has been construed as having taken effect without legislation. Thus section 24 of the bill of rights provides that "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied," yet the effect has been to repeal so much of that portion of section 583 of the code as relates to the allowance of a petition in error. So the addition of the words "or damaged" to section 13 of the bill of rights of the constitution of 1867, which as amended forms section 21 of the bill of rights of our present constitution, and the same in regard to many other provisions which on an examination of the constitution will readily be perceived. This rule seems to be fairly deducible from the authorities: that if the constitutional provision either directly or by implication imposes a duty upon an officer or officers no legislation is necessary to require the performance of such duty. This principle has been recognized to its full extent in this state, where for a long time after our present constitution took effect officers, where there were no statutory provisions upon the subject, performed their duties directly under the authority of the constitution, and in no case in this court has such action been questioned.

We are referred to *Reineman v. C., C. & B. H. R. R. Co.*, 7 Neb., 310, but in that case it was decided that the constitution merely *limits* the power of the legislature to fifteen per cent. It is not a grant of power to vote bonds to the extent of fifteen per cent. Had it been, a different question would have been presented, as we have no statute authorizing the issuing of this class of bonds in excess of ten per cent.

In the case at bar there is a plain requirement that all "bonds or evidences of indebtedness so issued \* \* shall have endorsed thereon a certificate signed by the secretary and auditor of state, showing that the same is issued pursuant to law," and the result of the want of certification is declared in the same connection. The certifying of this class of bonds has been continued without objection under this provision of the constitution from the time it took effect till now, and has been recognized by this court as valid and necessary in at least one case. *State v. Alexander*, 14 Neb., 280. There is no doubt that hundreds of thousands, if not millions of dollars of this class of bonds have been thus certified, the value of which would be now affected by an adverse ruling.

4th. But it is sought to limit the bonds to be certified to the additional five per cent in excess of the ten per cent. It may be conceded that the punctuation as it appears in the original article on file in the secretary's office would admit of this interpretation. But a careful examination of the entire section convinces us that such restriction was not intended. The words, "*no bonds or evidences of indebtedness so issued*," evidently include all bonds or evidences of indebtedness issued by the municipality for the purpose named. The sense would not be materially different if the provision was that all bonds or evidences of indebtedness issued for railroads or other works of internal improvements should be certified in the manner provided.

Some objection is made to the city as relator, but section

31, chapter 9 of the Comp. Stat., seems to authorize the proceeding.

Upon the whole case it is apparent that the plaintiff is entitled to the writ, and it will be issued as prayed

WRIT AWARDED.

THE other judges concur.

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STEPHEN TURNER, PLAINTIFF IN ERROR, V. THE SIOUX CITY AND PACIFIC RAILROAD, DEFENDANT IN ERROR.

1. **Exemption.** Sixty days wages of a laborer, mechanic, or clerk who is the head of a family are exempt from execution, attachment, or garnishment, and it is the duty of the employer summoned as garnishee, when knowing the facts, to state them in his answer.
2. ———: **GARNISHMENT.** Where there was no charge of bad faith on the part of the employer in failing to state in the answer in garnishment that the wages were exempt, and in pursuance of the order of the court paid the money into court where the debtor claimed it as exempt, and filed a motion supported by affidavits for its delivery to him, which motion was overruled, the debtor will, so far as the garnishee is concerned, be concluded by the garnishment proceedings and cannot afterwards bring an action against the garnishee to recover the debt.

ERROR to the district court for Washington county. Tried below before WAKELEY, J.

*John Lothrop*, for plaintiff in error, cited: *Drake* on Attachment, 5th Ed., § 711. *Albrecht v. Treitschke*, 17 Neb., 205.

*L. W. Osborn* and *Joy, Wright & Hudson*, for defendant in error, cited: *Peters v. Dunnells*, 5 Neb., 465. Maxwell's Pl. and Pr., Ed. 1880, p. 76. *Conley v. Chilcote*, 25 Ohio State, 320. *Moore v. R. R.*, 48 Iowa, 385.

19	241
33	754
19	241
34	796
19	241
37	853
19	241
39	690
19	241
61	85

MAXWELL, CH. J.

This is an action brought by the plaintiff against the defendant to recover for wages claimed to be due for services rendered by the plaintiff to the defendant in 1883.

The defendant filed an answer in which it admits that on the 12th day of November, 1883, it was indebted to the plaintiff in the sum of twenty dollars, but that on said day it was garnished in an action then pending in the county court of Washington county, wherein Downing & Co. were plaintiffs, and the plaintiff herein defendant. The third count of the answer, which contains the facts relied upon as a defense in this case, is as follows:

"3d. That on said 12th day of November the firm of Downing & Co. commenced action in the county court of Washington county, Nebraska, in which said Downing & Co. were plaintiffs and Stephen Turner aforesaid was defendant.

"That an order of attachment was issued in said cause after the filing of an affidavit in attachment therein, which said affidavit alleged that there was due from the defendant to the said Downing & Co. the sum of nineteen dollars for merchandise sold and delivered by the said Downing & Co. to the said Stephen Turner, and that said goods were obtained by said Turner from said Downing & Co. fraudulently, and that said Turner fraudulently contracted said debt.

"That on said day, and in said action, said Downing & Co. filed an affidavit in garnishment wherein it was stated that said plaintiff had good reason to believe that the Sioux City & Pacific Railroad Co., the defendant herein, being a resident of Washington county, Nebraska, had property of the said defendant Stephen Turner, consisting of moneys and credits in its possession, and also that said Sioux City & Pacific Railroad Co. was indebted to the said Stephen

Turner, defendant in said action, in an amount unknown to said Downing & Co.

"That on said 12th day of November, 1883, a bill of particulars having also been filed in said action, said county court having jurisdiction of said action, a summons was issued by said court in said action against the said Stephen Turner; also an order of attachment against his property, and a summons or notice in garnishment against the Sioux City & Pacific Railroad Co., all in manner and form as provided by law, and returnable and answerable at 10 o'clock A.M. on the 16th day of November, 1883, that said summons or notice in garnishment was duly and legally served upon this defendant on the 12th day of November, 1883, in Washington county, Nebraska, which said summons commanded this said defendant to appear in said court at 10 o'clock A.M. on said 16th day of November, 1883, and true answers make to all such questions as might be propounded to it, touching the property, moneys, rights, and credits in its possession, or under its control, belonging to the said defendant Turner, and also to answer all such questions as should be propounded to it touching its indebtedness of every kind and nature to the said defendant Turner, and not to omit to appear and make such answers and disclosures under the penalty of the law. And this defendant further shows, that on the said 12th day of November, 1883, the summons hereinbefore named, issued in said cause, was duly and legally served upon said defendant Turner, personally, in Washington county, Nebraska.

"And defendant further shows that at the time named in said summons, at which the same was returnable and answerable, said defendant Stephen Turner appeared in said court and in said action by himself and his attorney, and filed his motion supported by affidavits to discharge said attachment for the reason that the grounds for attachment stated in said affidavit of the plaintiffs Downing & Co. were not true. That said motion was fully heard in

said court, said court having jurisdiction of the parties to and the subject matter of said action, and being fully advised, on consideration said court overruled said motion.

"That thereupon, in obedience to said summons and garnishment, this defendant was required to answer touching the property in its possession belonging to the said defendant Turner, and also touching its indebtedness to the said defendant.

"That at said time this defendant did make answer under oath, admitting its indebtedness to said Turner at said date in the sum of \$20.10. That thereupon, on consideration of said court, this defendant was ordered, adjudged, commanded, and required to pay into court as garnishee the said sum of \$20.10, being the amount of its indebtedness to the said defendant Turner, there to remain and await the further order of said court.

"And this defendant further states, that in conformity with and in obedience to said order and judgment, this defendant did, then and there, pay into court said sum of \$20.10.

"And this defendant further shows that at the commencement of said action, said Downing & Co., plaintiffs, filed their undertaking or bond in attachment to said Stephen Turner, which undertaking was by said court on said 12th day of November, 1883, duly filed and approved.

"And this defendant further shows that on said 16th day of November, 1883, said defendant Stephen Turner, after the said sum of \$20.10 had been paid into court, and while the same was in the possession and custody of said court, by himself and attorney appeared therein and filed his motion to require said court to pay over to said defendant Turner the said sum of \$20.10, for the reason that the same was for less than sixty days' wages due to him, said defendant, as a resident of Washington county, Nebraska, and the head of a family, which said motion was supported



by affidavits; that said motion was duly heard on said day, and said court having jurisdiction of the parties and the subject matter, and being fully advised did overrule the same. That all questions pertaining to the right of said defendant Turner to said money were fully presented and duly considered by said court.

"That on said day said plaintiffs Downing & Co., upon consideration of said court, obtained a judgment against said Stephen Turner in the sum of nineteen dollars, which, with the cost of said action, exceeds the sum of \$20.10.

"And this defendant further shows that no action or proceeding has been taken or had to reverse or modify the judgment, orders, or rulings of said court in said action, but that the same still remains in full force.

"And this defendant further states that at said date it was not indebted to said Stephen Turner in any other or greater sum than the said \$20.10, and that by the payment of the same into court said debt was satisfied, and this defendant absolved from all liability to the said defendant, and that it has not been indebted to the said defendant since said date in any sum whatever. Wherefore this defendant prays that it may be dismissed and go hence without day and recover of the plaintiff its cost herein expended."

The plaintiff filed a reply to the second paragraph of the answer, alleging that at the time the services were rendered and at the time of garnishee proceedings plaintiff was married and had a family residing in Washington county, Nebraska. That the amount due was for less than sixty days' labor; that defendant's agent knew the facts before *paying the money into court*, and that plaintiff requested the agent to set up plaintiff's exemptions.

2d. That the judgment named in favor of Downing & Co. was for merchandise, and not for clerk's, laborer's, or mechanic's wages, or for money collected by an attorney, etc.

3d. Third paragraph of the reply denies that the exemption of said money was passed upon in the county court—denies that the judgment and order overruling plaintiff's motion and requiring the defendant to answer absolved the defendant from liability to the plaintiff, and denies that the court had jurisdiction of the *wages*.

The plaintiff filed a separate demurrer to each count of the reply. The demurrers were sustained and judgment rendered for the defendant.

In *Wright v. The C., B. & Q. R. R. Co.*, ante p. 176, it was held that sixty days' wages of a laborer, mechanic, or clerk who was the head of a family were absolutely exempt from execution, attachment, or garnishment, whether the employe and his family were residents of the state or not. It is not the policy of this provision of the statute to limit its benefits to residents of the state, nor to offer a premium to residents of other states to evade their own exemption laws, where the debts were contracted and are payable, by coming into this state, and seizing property of the debtor upon the ground that he is a non-resident of this state. Such a palpable evasion of the exemption law will not be tolerated. There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought. That is, that the law in force when and where a debt was contracted should govern as to the rights of the creditor and debtor in that case. *De Witt v. Sewing Machine Co.*, 17 Neb., 533. *Dorrington v. Meyers*, 11 Id., 388. *Bills v. Mason*, 42 Iowa, 329. *Warner v. Cammack*, 37 Id., 642. But that question is not before the court, as it is alleged that the plaintiff is a resident of this state, although it was stated in the argument that the debt was contracted in Iowa while the plaintiff was a resident thereof.

Where the employe is the head of a family, and not more than sixty days' wages are due him for his services, it is

the duty of the garnishee to set up these facts in his answer in garnishment. And no doubt where the garnishee is aware of these facts and fails to set them up in his answer—facts which show that the money held by him is not subject to garnishment, and the proceedings are *ex parte*, the payment of the money into court in pursuance of an order thereof will not constitute a defense in an action by the employe to recover the same, because it is the duty of the garnishee to state all the facts known to him that would affect the right of the creditor to recover. The garnishee, however, may not be aware at the time the answer is filed that the debtor is the head of a family, and therefore would not be answerable for a failure to allege that fact.

It will be observed that the plaintiff in his reply alleges that he was married and had a family residing in Washington county at the time the services were rendered and the proceedings in garnishment had, and that the amount due was for less than sixty days' labor. It is also alleged that defendant's agent knew these facts before *paying the money* into court, and that the plaintiff requested such agent to set up plaintiff's exemptions. There is also a denial that the exemption of said money was passed upon by said county court. There is no denial, however, that while the money was in the custody of the court the plaintiff and his attorney appeared therein "and filed a motion to require the court to pay over to the defendant (the plaintiff herein) the said sum of \$20.10, for the reason that the same was for less than sixty days' wages due to him, said defendant, as a resident of Washington county, Nebraska, and the head of a family, which said motion was sustained by affidavits; that said motion was duly heard on said day, and said court, having jurisdiction of the parties and the subject-matter, and being fully advised, did overrule the same; that all questions pertaining to the right of said defendant Turner to said money were fully presented and duly considered by said court."

These facts are not denied nor is it alleged that the defendant had knowledge that the plaintiff herein was the head of a family when the answer in garnishment was made. The plaintiff herein thereupon set up the facts and claimed the money as exempt. The ruling of the court, however, was adverse to him. Upon what particular ground this ruling was placed we are not advised. It may have been that the court found that the plaintiff was not the head of a family. If so, its judgment may have been erroneous, but not void. That question was one of fact and open to inquiry, and the decision of a court thereon having jurisdiction of the subject-matter and the parties will be conclusive on the questions presented unless an appeal was taken.

There is no allegation or claim that the defendant acted in bad faith or failed to set up all the facts in its possession when making its answer in the garnishment proceedings, and having paid the amount owing the plaintiff herein into court, to which he immediately made claim on the ground that the money was exempt, he is as against the defendant concluded by the ruling of the court on such motion, and cannot afterwards maintain an action for the same debt against the garnishee.

The demurrers to the several counts of the reply therefore were properly sustained, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. S. E. HOSTETTER,  
v. J. G. HOLDEN ET AL.

19	249
47	50
19	249
49	341

1. **Cities of Second Class and Villages.** When a village contains more than one thousand and less than twenty-five thousand inhabitants, it is the duty of the board of trustees to divide it into not less than two wards, and call an election at the proper time, for the purpose of electing such officers as the statute requires to be elected in a city of the second class.
2. ———. A general law creating cities of the second class need not be accepted by the municipalities named to make it operative upon them.
3. ———. Procedure where a city of the second class containing more than 1,500 inhabitants desires to adopt village government.

ORIGINAL application for mandamus.

*S. E. Hostetter, pro se.*

*E. F. White, for respondent.*

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendants, who constitute the board of trustees of Central City, to divide that place into wards, and give notice that at the next annual election therein the officers of a city of the second class will be elected for said municipality.

The relator alleges in his petition that he is a resident and tax payer of Central City; that at the time the census was taken, in June, 1885, the returns show that said village contained 1,235 inhabitants; that by virtue of the number of inhabitants said village, under the statute, had become a city of the second class, and should be organized and governed by the provisions of law regulating such cities; that on the 20th of February, 1886, the relator and other citizens and tax payers of said village requested the

defendants to divide said village into wards, and give notice that at the next annual election city officers would be chosen for said village, but said defendants refused to act in the premises, etc. The object of the action is to obtain a construction of so much of chapter 14 of the Compiled Statutes as relates to the organization of cities of the second class containing more than one thousand and less than twenty-five thousand inhabitants.

Sec. 1 is as follows: "All cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants shall be cities of the second class, and be governed by the provisions of this chapter, *unless they shall adopt a village government as hereinafter provided,*" etc.

Sec. 2 provides that "each city of the second class shall be divided into not less than two nor more than six wards, as may be provided by ordinance of the city council thereof, and each ward shall contain, as nearly as practicable, an equal number of legal voters, and an area as equal to each other as practicable." There are other sections, relating to the officers of the city and their duties, to which it is unnecessary to refer.

It will be observed that the statute declares that all "cities, towns, and villages containing more than one thousand and less than twenty-five thousand inhabitants *shall* be cities of the second class."

Our constitution prohibits special charters to cities, towns, and villages, and, in effect, compels the incorporation, regulation, and government of municipal corporations by general law, hence the division of such corporations into classes, according to the number of inhabitants, as cities of the first class, cities of the second class, villages, etc., and the bestowal upon each class of such powers as the legislature has seen fit. Thus, a town or village containing not less than two hundred inhabitants nor more than fifteen hundred, may be organized as a village, and is invested with

certain rights, powers, and immunities. When the village contains more than one thousand and less than twenty-five thousand inhabitants, the statute declares it to be a city of the second class, and greatly enlarges its powers.

But it is said that to make the statute effectual it must be accepted by the corporation. Where there is no provision of law requiring an acceptance of the provisions of the statute, in order to render them operative, no such acceptance is necessary. The rule which applies to private corporations in that regard has no application to municipal corporations, unless the act of incorporation is made conditional.

In *People v. Morris*, 13 Wend., 337, it is said: "The distinction between public and private corporations is strongly marked, and as to all essential purposes they correspond only in name. We speak of the erection of a town or county, and the term would be just as appropriate when applied to cities or villages. They are, severally, political institutions erected to be employed in the internal government of the state. There is no contract between the government and governed, for but one party is concerned—the public; and the inhabitants upon whom the powers and privileges are conferred are mere trustees, who hold and exercise such powers for the public good. The only interest involved is the public interest, and no other is concerned in their creation, continuance, alteration, or renewal. *Berlin v. Gorham*, 34 N. H., 266. *Warren v. Charlestown*, 2 Gray, 104. *People v. President*, 9 Wend., 351. *Dillon Mun. Corp.*, § 23, and notes.

The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and the powers they confer are nothing more than mandates of the sovereign power; and these laws may be repealed or altered at the will of the legislature, except so far as the repeal or change may affect the rights of third parties acquired under them. *Field on Corporations*, § 36, and cases cited in notes.

We have no doubt, therefore, that Central City is within the provisions of the statute, and that no acceptance of the same was necessary by the legal voters of said city to make the statute effective.

2d. While there is no express authority conferred upon the village trustees to divide the city into wards and call an election for the purpose of electing officers of a city of the second class, still such power is clearly implied. The village government must, from the nature of the case, continue until superseded by that of a city, and by section 50 of the act the board of trustees is required "to give public notice of the time and place of holding each election," and by section 42 it is provided that every trustee shall hold his office for one year, "and until his successor is elected and qualified." It is evident, therefore, that it is the duty of the board to divide the village into not less than two wards, and call an election for the purpose of electing such officers of a city of the second class as the statute requires.

3d. Section 53 provides that "whenever any city of the second class containing more than fifteen hundred inhabitants desires to discontinue its organization as a city and organize as a village, and one-fourth of the legal voters of such city shall petition the city council, the council shall cause the same to be published for at least thirty days a notice stating that the question of adopting village government will be submitted at the next annual city election," etc. The apparent purpose of this provision is to enable those who may be opposed to city government, if they constitute one-fourth of the legal voters, to cause a vote to be taken on the question of continuing the same; in other words, if after a trial for a reasonable time a city government is not satisfactory to at least one-fourth of the legal voters of the city they may petition the city council to submit the question of adopting village government to the legal voters at the next annual city election. As Central City probably contains more than 1,500 inhabitants at the



## State v. Saline County.

present time, the question, if so desired, can be submitted to the legal voters next year; but as the village comes within the provisions of sections 1 and 2 of chapter 14 of the Compiled Statutes, it is the duty of the defendants to comply with the prayer of the petition. The writ will therefore issue as prayed.

## WRIT AWARDED.

THE other judges concur.

19	253
36	546
37	431
19	253
52	36

THE STATE OF NEBRASKA, EX REL. THE GLOBE PUBLISHING CO., v. THE BOARD OF COUNTY COMMISSIONERS OF SALINE COUNTY.

1. **County: STATIONERY SUPPLIES.** In procuring the supplies for a county mentioned in section 149, chapter 18 of the Compiled Statutes, where the cost exceeds \$200, it is the duty of the county board after due notice to let the contract to the lowest bidder that can give adequate security for the performance of the agreement, and there is no authority to let such contracts in any other way.
2. ———: ———. The county board may reject all bids for such supplies; but upon doing so it is its duty to again advertise for the furnishing of supplies.
3. ———: ———. In the absence of fraud, where the board rejects all bids, the lowest bidder cannot compel the awarding of the contract to himself.
4. ———: ———. A tax payer in a proper case may compel the county board to take the necessary steps to let the contract for supplies to the lowest bidder.

ORIGINAL application for mandamus.

*Abbott & Abbott and Dawes, Foss & Stephens, for relator.*

*Hastings & McGintie, for respondent.*

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendants to award the contract for the supplies for Saline county for the year 1886 to the relator.

It is alleged in the petition that the plaintiff is a corporation duly organized under the laws of this state; that on the 3d day of December, 1885, the county clerk of Saline county published in the *Opposition*, a newspaper published at Wilber, in said county, estimates of the probable number of each item of books, blanks, and stationery required by said county for the use of its various officers for the year 1886, and invited sealed proposals for furnishing the same; that the cost of furnishing books, blanks, and stationery for the officers of said county greatly exceeds the sum of \$200 per year; that on the 31st of December, 1885, the relator filed a bid in writing with the county clerk of said county "in and by which the plaintiff offered and proposed to furnish all the items so advertised for, and did state the several items thereof, and the quality of each, and the price of each gross item thereof;" that "said bid was the lowest bid and in response to said advertisement, and that the plaintiff is competent and amply responsible for furnishing such supplies, and each and every item thereof; that it has tendered to said county board a good and sufficient bond for the faithful performance of its bid, in the sum of \$1,000, with two good and sufficient sureties, residents of the state;" that "said county board at its first meeting in January" opened all the "bids so filed, being two in number," and "refused to award the contract for furnishing such supplies to either; but rejected both of said bids and refused to further advertise for bids, but have in violation of the statute employed one Ben. H. Hayden to furnish all such supplies as may be needed for the current year in the several county offices; and did then and there re-

quire the several officers of said county to procure such supplies as were required for their several offices for the current year from said Hayden," etc.

The defendants filed an answer to the petition, and the relator has demurred to certain counts of the answer, but in the view we take of the case neither the answer nor demurrer need be noticed.

The statute requiring the county board to award contracts for supplies to the lowest bidder is as follows (Sec. 149, chap. 18, Comp. Stat.): "In all counties where the cost of furnishing the officers with books, blanks, and stationery shall exceed the sum of \$200 per year, the supplies for such purposes shall be let in separate contracts to the lowest competent bidder, who shall give bond for the faithful performance of his contract with at least two good and sufficient sureties, residents of the state. The bond required by this section shall be approved by the county board and the sureties therein shall justify in the same manner as sureties on official bonds.

"Sec. 150. It shall be the duty of the county clerk on or before the first day of December, annually, to prepare separate estimates of the books, and blanks, and stationery required for the use of the county officers during the coming year, and which by law are not required to be furnished by the state, and during the first week in December he shall publish a brief advertisement in one newspaper published in his county, stating the probable gross number of each item of books, blanks, and stationery required by such county during the year following the first day of January next ensuing, and inviting bids therefor, which bids shall be filed with said clerk on or before the said first day of January.

"Sec. 151. The county board shall, at their first meeting in January in each year, open said bids and award the contract for the furnishing of all such books, blanks, and stationery as may be required by county officers to the

lowest bidder competent under the provisions of this subdivision, and who complies with all its provisions; *Provided*, That the county board may reject any or all bids.

"Sec. 152. The accounts for books, blanks, and stationery furnished under said contract shall be audited and paid as other accounts against the county, and no county board or other county officer shall procure any such books, blanks, and stationery from any person other than the contractor or his assignee during the existence of such contract, and no account therefor shall be paid by the county."

These are special provisions that regulate and control the letting of contracts for the supplies mentioned in the statutes. It will be observed that the language of section 149 is, that "the supplies for such purposes *shall be let in separate contracts to the lowest competent bidder* who shall give bond for the faithful performance of his contract," etc.

Section 150 requires the county clerk annually to prepare *separate* estimates of the books, blanks, and stationery required, and publish a brief advertisement in one of the newspapers of the county inviting bids. This advertisement, from the nature of the case, should be sufficiently full and explicit to enable bidders to bid thereon intelligently.

In *State v. York County*, 13 Neb., 65, it is said: "These propositions should distinctly specify the kind and quality desired, and if possible the commissioners should provide samples as a basis on which to make the bids, so that all would be made on the same basis. The object of the law is to invite competition and prevent favoritism and fraud. And this can best be accomplished by placing all bidders on an equality in making their bids."

The advertisement in this case is as follows: "Sealed proposals will be received until noon of the first day of January, A.D. 1886, for furnishing supplies of stationery for the several county offices for the year 1886, to-wit:

One sheriff's day book.  
One eight quire deed record (plain).  
Two eight quire deed records (printed).  
Two eight quire mortgage records (plain).  
Two eight quire mortgage records (printed).  
Two eight quire inventory and appraisement books for county judge.

All records to be Weston's best ledger paper, endorsed with appropriate title and numbered.

3,000 blank county warrants.

2,000 probate blanks, consisting of appointments, inventories, etc.

500 blanks for sheriff.

5 reams of legal cap.

3,000 letter heads.

5,000 note heads.

3,000 envelopes.

2 doz. quarts of Arnold's ink.

5 gross Spencerian pens No. 1.

5 gross Spencerian pens No. 2.

5 gross Faber pencils No. 2.

All to be of best quality. For records, bidders will bid for each book separately. All other articles by gross, dozen, or piece, as the case may be, for what is needed, and contract to be entered into according to law."

This notice is quite indefinite, and as it is the duty of the defendants to re-advertise and let the contracts to the lowest bidder the defect should be remedied.

Section 151 requires the county board to award the contract to the lowest competent bidder—that is, the lowest bidder who is able to give adequate security. The board is also given authority to reject any and all bids. This is simply the reservation of a right to protect the interests of the county, as where there is a combination to prevent competition, or other cause, by reason of which the county would be defrauded. But in such case the board is not absolved

from the duty of letting the contract to the lowest bidder. It should at once re-advertise for bids, and may be compelled to do so.

In the argument of this case the attorneys for the defendants contended that the court would not control the *discretion* of the county board in the matter of letting contracts, and we were referred to *State v. Kendall*, 15 Neb., 262, to sustain that position. That case was decided entirely on the construction of the act approved Feb. 27th, 1883, for the erection of the new capitol, and although there are expressions in the opinion that the action of the state board would not be controlled by mandamus in the letting of contracts, yet the decision of the majority of the court is based entirely on the statute, and the case has no application to a county board, which must let contracts in the mode pointed out in the statute. *State v. Whedon*, 13 Neb., 57. And a tax payer or the lowest bidder in a proper case may compel a compliance with the statute. *People v. Commissioners*, 4 Neb., 161. *Follmer v. Nuckolls County*, 6 Neb., 204. *Merrick Co. v. Batty*, 10 Neb., 176. Where, however, all the bids are rejected and it is the duty of the county board to re-advertise and let contracts, a tax payer may compel the board to act in the premises; but the action of the board in rejecting all bids will not be controlled, at least where there is no fraud. The board will not, therefore, be compelled to award the contract in this case, but leave will be given to the relator to amend the petition by showing that it is a tax payer of the county, and that the defendants neglect to take the necessary steps for the reletting of the contract.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE CITY OF LINCOLN, PLAINTIFF IN ERROR, V. RE-  
BECCA E. WOODWARD, DEFENDANT IN ERROR.

**Municipal Corporations: DEFECTIVE SIDEWALK: DAMAGES.**

In an action to recover damages against a city for injuries caused by a defective sidewalk, where the proof shows that the sidewalk was defective at the time of the injury and had been so for a long time prior thereto, of which defect the street commissioner had actual notice, and that such defect caused the injury, the verdict will not be set aside as being against the weight of evidence.

ERROR to the district court for Lancaster county.  
Tried below before POUND J.

*Allen W. Field (Lamb, Ricketts & Wilson with him), for plaintiff in error.*

*Marquett, Deweese & Hall, for defendant in error.*

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff to recover for personal injuries sustained by her by falling on a sidewalk on L street in said city.

It is alleged in the petition "that said walk on the south side of L street in front of lot 3, block 100, in said city, was, on or about the 7th day of April, A.D. 1884, in a very imperfect, unsafe, and dangerous condition, and had been so for some time prior to said date; that the timber on which said sidewalk was built and to which the boards were nailed had rotted away, and the boards had become loose, so that it was unsafe for people to travel over said walk; the plaintiff, while going to her work on the morning of the 7th of April, 1884, using ordinary care and without any fault or negligence on her part, accidentally fell

on said sidewalk by reason of the unsafe condition thereof, and by reason of the same being in an imperfect state of repair."

Then follows a statement that the city had notice of the defect and of the injuries sustained.

The city in its answer, after a denial of the facts stated in the petition, alleges, "that whatever of injury the plaintiff may have received, which the defendant does not admit, was by reason of her own carelessness and negligence, and was not in any manner occasioned by any fault or negligence of this defendant."

On the trial of the cause the jury returned a verdict in favor of the plaintiff below for \$1,000.

The principal error relied upon in this court is, that the verdict is against the weight of evidence. The testimony tends to prove the following facts: That on the 7th of April, 1884, the sidewalk at the place indicated was laid with boards one inch thick and six inches wide; that it had been put down in 1879 or 1880, and at the time the injury occurred some of the stringers on which the walk was laid had become rotten, and some of the boards were loose and had been for some time before the accident; that the walk was about five feet in width, and some of the boards were bent down in the middle somewhat like a rocker; that on the day named the plaintiff below in passing over said sidewalk at the point indicated, met a man passing in an opposite direction on said sidewalk. The man in passing stepped on the end of one of the boards, which caused the other end to raise up and trip the plaintiff, causing her to fall on her face, by reason of which she was severely and permanently injured.

The injury was conceded by the attorney for the plaintiff in error to be severe and permanent, and the proof fully sustains the admission. The principal objections on behalf of the city to the want of evidence are, 1st, The failure to prove that the sidewalk in question was in an



unsafe condition; and 2d, If it was unsafe, that the city had notice. On the first point we have the evidence of the plaintiff below, who testifies, "I noticed as I came up to it that it was a loose, shaky sidewalk, and always tried to be careful when I came over such places."

Q. Where you met this man did you notice that that board was loose?

A. Not that board.

Q. Noticed some loose boards?

A. Yes, sir.

Q. Before you got to this one?

A. Not before I got the fall.

Q. After you got the fall?

A. Yes.

Q. Where were you looking when you met with the fall?

A. Ahead of me.

Thomas W. Lowrey testifies: "I am very positive a great many of the boards were loose in that space opposite Mr. Hastings' lots, I think he owns a hundred feet there if I remember right, and I am quite positive there were a good many loose boards in front of his house."

Q. How long had this been in this condition prior to April, 1884?

A. Pretty much all last winter.

Q. A year ago?

A. Yes.

W. Q. Bell testifies in answer to the question, "What condition was it in until it was repaired?" "In front of Major Hastings' place loose boards and boards that were out in there, boards all seemed to be thin inch lumber, and had been broken, and some of the ends lay down on the ground between the joists that held them up. Some of the boards were out in there, and some of them were loose. I know this fact. My attention was especially called to the condition of the walk by passing there with my wife and she remarked it."

Q. Can you give an idea how long it was in this condition prior to the time a new one was put in there?

A. I should say a long time.

Q. About what length of time?

A. I should say two years, possibly not quite so long.

Alva Kennard testifies that he considered the sidewalk at the place designated in bad condition, and to the same effect nearly all the other witnesses. The fact that the sidewalk was out of repair at the time of the accident and had been for a considerable time previously, is clearly established by the evidence; and there is considerable proof tending to show that the city marshal and street commissioner had notice of the defect complained of some time before the accident occurred. This was sufficient although there is no doubt the defect had existed for so long a period as to raise the presumption of notice. No particular error has been pointed out in the instructions, and we do not deem it proper to discuss questions that it is unnecessary to consider in the determination of the case. It is apparent that there is no error in the record, and the judgment must be affirmed.

**JUDGMENT AFFIRMED.**

**THE other judges concur.**

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62 427a

**WYATT P. HUTCHINSON, PLAINTIFF IN ERROR, v. THE  
STATE OF NEBRASKA, DEFENDANT IN ERROR.**

1. **Trial: CHALLENGE TO JURORS.** It is not error for a trial court to sustain a challenge to a juror who testifies, upon examination as to his competency, that he resided in the neighborhood where one of the parties resided and had heard a great deal of talk about the case, that he was not free from bias, and that he thought this condition of his mind would influence him in his verdict.

2. ———: ———. Unfriendly feeling toward an attorney engaged in a trial is not sufficient ground for challenge of a juror for cause, he being competent in all other respects, when it is shown by his testimony that he could render a fair and impartial verdict uninfluenced by such feeling.
3. **Bastardy: TRIAL: EVIDENCE.** When in a prosecution under the provisions of chapter 37 of the Compiled Statutes of 1885, entitled "illegitimate children," the prosecutrix being called as a witness takes with her to the witness stand the child, the paternity of whom is in question, said child being only about seven months old, it is not error for the trial court to refuse to order the child to be removed, there being no reference made to it during the trial or argument, and no comparison being made between it and the alleged father.
4. ———: ———: **PLEA OF REPUTED FATHER.** When a person charged with being the father of an illegitimate child is placed upon trial in the district court, and through inadvertence a plea to the complaint is not taken until after the jury is impaneled and a plea of not guilty is then entered, such omission to enter the plea before the impaneling of the jury would be an irregularity, but without prejudice, and a new trial will not be granted for that reason.
5. ———: **PLEADINGS.** In a prosecution under chapter 37, Compiled Statutes of 1885, entitled "illegitimate children," no pleadings are necessary in the district court except those specified in the act.
6. **Evidence: EXPERT WITNESSES: CROSS-EXAMINATION.** Where a witness is examined in the trial of a cause as an expert, and testifies as to his opinions upon scientific questions involved in his profession, it is competent upon cross-examination to inquire as to the extent of his knowledge and his familiarity with the accredited standard authors of his profession.
7. **Error Without Prejudice.** A judgment will not be reversed for errors occurring at the trial, unless such errors are to the prejudice of the party complaining.
8. **Verdict.** A judgment will not be reversed upon the ground that the verdict is against the weight of evidence where the testimony is conflicting, if there is sufficient testimony to sustain the verdict.

ERROR to the district court for Cass county. Tried below before POUND, J.

*Crites & Ramsey*, for plaintiff in error, on presence of child at the trial, cited: *Hanawalt v. State*, 24 N. W. R., 489. *Young v. Makepeace*, 103 Mass., 50. On arraignment and plea, cited: *Aylesworth v. State*, 65 Ill., 301. *Greater v. State*, 54 Ind., 159. *Grigg v. People*, 31 Mich., 471. On opinion of expert witnesses, cited: *Stilling v. Thorp*, 54 Wis., 528. *Com. v. Sturtivant*, 117 Mass., 130.

*Jesse B. Strode*, District Attorney, for the state, cited: *State v. Weber*, 22 Mo., 321. *State v. Cassady*, 12 Kan., 550.

REESE, J.

This was a proceeding against plaintiff in error under the bastardy law of the state. The trial in the district court resulted in a verdict of guilty and judgment thereon in the usual form.

The errors assigned in the brief of plaintiff in error will be examined in the order in which they occur therein.

The first contention is, that "the court erred in sustaining a challenge for cause of the defendant in error to the juror William Cole." The *voir dire* examination of this juror disclosed the fact that he had lived in the neighborhood where plaintiff in error resided; that he knew him and had heard a great deal of talk about the case; that he did not know that he had any opinion as to who should prevail in the suit; that he could not say that his mind was entirely free from bias or prejudice in the case; that he rather thought that the condition of his mind in that respect would have some influence in his finding a verdict, and that his mind was not entirely free from some bias or prejudice. The answers of the juror were no doubt made in candor, and correctly portrayed the condition of his mind. This showed that he was not impartial and that his mind was not free from bias. The court did not err in sustaining the challenge.

The next is, that the court erred in overruling a challenge made by plaintiff in error to A. B. Taylor, a proposed juror. His examination shows that he was not acquainted with either of the parties to the suit, and that he had no opinion as to which party should prevail, and that he did not feel any bias in his mind one way or the other with reference to the case. He was then asked by counsel for plaintiff in error whether he had any prejudice against the counsel for plaintiff in error. His answer was that he had not. He subsequently stated in answer to the attorney that he "did not particularly like him as a man," but that notwithstanding any difficulty he might have had with the attorneys, he thought he could render a fair and impartial verdict, unbiased by anything that had transpired. He was asked whether or not he had made threats of violence against the attorney and whether he had a perfectly friendly feeling toward him in the case. To these two questions objections were made by counsel for defendant in error, which were sustained and which ruling is now assigned for error. Assuming for the purposes of the case that the enquiry was entirely legitimate, we cannot see that the juror was incompetent to sit in the case. He testified in substance that while he did not particularly like the attorney as a man, yet this personal feeling would not prevent him from rendering a fair and impartial verdict in the case. As to whether he felt "perfectly friendly to counsel" as an attorney in the case, or whether he had "at one time or another" made threats of personal violence, were not material matters of inquiry. But we are not aware of any law which would render the juror incompetent by reason of an aversion to counsel employed in the case on trial and none has been cited. We cannot hold that the ruling was erroneous.

3d. "The court erred in overruling the objection of plaintiff in error to the complaining witness bringing her child in view of the jury while testifying." Upon this point the record shows that the complaining witness was

called, and being about to take the witness stand with the child in question in her arms, counsel for plaintiff in error objected "to the complaining witness bringing her child before the jury. Overruled and exception, and said child was brought into plain view of the jury and kept there while complaining witness gave her testimony." As to whether anything was said about the child during the trial or not, the record is entirely silent, except that she was its mother and plaintiff was its father. It was conceded on the argument in this court that no reference was made to it either during the introduction of the testimony or argument of the case by way of comparison to plaintiff in error, and nothing is shown by which it appears that any conclusion was drawn or sought to be drawn from the features or appearance of the child. It must be apparent to any mind that the mere presence of the child could have no prejudicial effect upon the rights of plaintiff in error. A number of authorities are cited which hold that it is improper to introduce or present a child to a jury for the purpose of permitting the jury to draw conclusions as to its paternity from a supposed resemblance to the alleged father, unless by a difference in color or some other marked characteristic the resemblance or want thereof can be clearly shown. But that is not this case. There was nothing claimed by defendant in error of the kind suggested. The only thing objected to was the *presence* of the child. Whether the attention of the jury would have been called to its presence had it not been done by plaintiff in error, is, of course, a matter of surmise only; but as the age of the child was only about seven months and nothing was claimed or said as to any resemblance, it is clear the case does not fall within the rule laid down by the cases cited.

4th. Section 5 of chapter 37 of the Compiled Statutes of 1885, provides in substance that when the party charged with being the father of an illegitimate child is held upon such charge to answer thereto before the district court,

pleads not guilty to the charge before the district court to which he is recognized, the court shall order the issue to be tried by a jury. In the case at bar the jury was impaneled on Saturday evening, when the court was adjourned until the next Monday. At that time the parties and all the jurors appeared in court for the purpose of proceeding with the trial. The complaining witness was sworn and took the witness stand. Plaintiff in error then objected to any evidence being given in the case, for the reason that no issues were formed by plea or otherwise, no plea of guilty or not guilty having been entered. Whereupon the court required plaintiff in error to plead to the charge, whether guilty or not guilty. Saving to himself the objection and exception to the order of the court, he entered a plea of not guilty and the trial proceeded. It is claimed that this was an irregularity amounting to a mistrial. A number of authorities are cited, and with which the reports of criminal trials abound, to the effect that a trial in a criminal cause without a plea to the indictment, information, or complaint is a mistrial, in fact, no trial of an issue at all, and that such a proceeding is simply nugatory. But without stopping here to inquire what the effect of such a proceeding in a case of this kind would be, it being a *civil* action and not a criminal one (*Cottrell v. The State*, 9 Neb., 125; *Jones v. The State*, 14 Id., 210), we do not hesitate to hold that the irregularity spoken of was without any prejudice to the rights of plaintiff in error, and the judgment could not for that reason be reversed. Had the trial proceeded to a verdict without a plea having been entered, or had the court refused to reswear the jury, if requested by plaintiff in error, another question would have been presented, but such was not the case.

That the proceeding was irregular cannot be doubted, but that it was prejudicial, and that plaintiff in error was deprived of any substantial right cannot be maintained.

The fifth objection, that the court erred in refusing to

direct the cause to be tried upon pleadings—petition, answer, etc.—as in civil cases, is not presented by the record, and if it were it could hardly be contended for in view of the special provisions provided for in chapter 37, Compiled Statutes of 1885, notwithstanding the fact that proceedings of this kind are civil and not criminal as decided in *Cottrell v. The State, supra*.

6th. It is next contended that the court erred in overruling the objection of plaintiff in error to certain questions propounded to Dr. A. L. Root by defendant in error, upon cross-examination. It was alleged by the prosecutrix that the intercourse which resulted in the birth of the child consisted of a single act of copulation had by force and against her consent and at the period of the menstrual flow, and that the time of gestation was extended. Plaintiff in error sought to show by this witness, by hypothetical questions as well as by his own experience, that the theory of the prosecution was wrong. That pregnancy would not probably result from a single act of intercourse under the circumstances named, that being the first and only such act of the prosecutrix. The witness was carefully and skillfully examined upon these several questions and with the purpose, perhaps, of confining him to his own experience and observations. Upon the cross-examination the following occurred:

Q. I will ask you to state, doctor, if the testimony that you have given in reference to a woman becoming pregnant in case of rape or when sexual intercourse is had by force, if the testimony which you have given is not based upon medical authorities rather than upon your own experience.

A. Yes, the testimony is all based upon medical authorities.

Q. I will ask you to state what the medical authorities hold upon that question now.

Objected to as incompetent, immaterial, and irrelevant,



and not proper cross-examination. Overruled and exception.

It is insisted that no ground for this question was laid in the examination-in-chief, and that the testimony was not the opinion of the witness but that of the medical authorities. We think there was no error in this ruling of the court. Aside from the fact that the testimony was given in chief upon the teachings of medical authorities to a great extent, we think the proper and legitimate scope of cross-examination would permit the interrogatory. If the witness had been testifying from his experience and observation from a long course of practice, it was yet proper, for the purpose of ascertaining his means of knowledge by a reference to the teachings of the text-books of his profession and the scientific works from which he had drawn the theories and principles to which he had testified. Again, we cannot conceive that it would be possible by any rule of evidence to base the testimony in chief of the witness upon his experience in obstetrics. For instance, the normal period of gestation, the probability of conception in the first act of intercourse, the length of the period of gestation in case of the first as compared with subsequent children, the number of days that ill health caused by uterine disorders would shorten the period of gestation, if at all, and many other prominent elements in the case presented by the defense would naturally and inevitably require the witness to go outside of the domain of *experience* as an obstetrician, and it seems to us that he very properly and truthfully answered that this testimony was based upon medical authorities. For the purpose, therefore, of testing his recollection as well as his knowledge, it was proper to interrogate him as to the teachings of those authorities, and in case his testimony was incorrect to confront him with them in order that he might be corrected and the jury thus be rendered able to judge of the weight to which his testimony was entitled. It is insisted that the

testimony was inadmissible because "the testimony of the witness shows that his opinion on the point in question was opposed to these same medical authorities." As we have shown, the testimony entered the domain of science, and the ground upon which the objection is founded appeals most strongly to the mind of the writer as cogent reasons why the cross-examination was proper.

"7th. The court erred in overruling the proposition of plaintiff in error to read from Lusk, on page 110, the words 'gestation protracted beyond the two hundred and eighty-fifth day is certainly a very rare occurrence,' and ask the witness Dr. Root, in connection with his testimony, whether his experience bears out that statement."

The question here presented is not whether the book referred to or any of its contents were admissible in evidence, for plaintiff in error contended in his brief that "books of science are inadmissible in evidence to prove opinions therein contained," and that the admissions of such evidence would be erroneous. The simple question was, whether or not the witness coincided with the view expressed by the author, or in other words whether the experience of Dr. Root was that gestation protracted beyond the two hundred and eighty-fifth day was of very rare occurrence. Upon the question of the length of the period of gestation this witness, as well as many others, was examined fully, and while the ruling may have been erroneous it was clearly without any prejudice to plaintiff in error. It is quite clear from the theory of plaintiff in error that it was not his purpose to get the quoted paragraph before the jury as evidence. This quotation was again presented to Dr. Miller upon his cross-examination by plaintiff in error, with the question as to whether that statement was authority in the profession? An objection was again sustained by the court. It is the opinion of the writer that had the question been propounded for the purpose of ascertaining whether or not the work was considered a repu-

table one and a standard of authority in the medical profession, with a view to its introduction in evidence, or for the purpose of testing the knowledge of the witness on cross-examination, the interrogatory would have been entirely proper and the ruling of the court would have been erroneous. But it is clear that counsel had neither purpose in view. In the preceding question the witness was asked if he considered the work referred to a "standard, recognized work in his profession," and he answered that he did. The book as a standard authority was fully sustained, and that was sufficient.

8th. The next error complained of is in overruling the objection of plaintiff in error to a question propounded by defendant in error to Dr. Livingston on cross-examination. The examination-in-chief of this witness, in some particulars, was confined to his experience and observation, while in others he clearly testified from his general information upon the subjects presented, which included the period of gestation, the probability of impregnation from intercourse during the menstrual flow, and as to his familiarity with certain works on the subject of midwifery. The question objected to was as follows: "I will ask you to state whether it makes any difference whether the woman consents and takes part voluntarily in the sexual act or not, as to her becoming pregnant?" It is claimed that this question was improper on cross-examination, no ground having been laid for it in the examination-in-chief.

We take it to be a proposition so elementary and well settled as not to require the citation of authorities, that in case of the examination of expert witnesses a wide range should be given to the cross-examination for the purpose of testing the knowledge of the witness as to the subject upon which he assumes to testify. Under this rule, if no other, the question was proper.

The last contention of plaintiff in error is, that the verdict is against the clear weight of the testimony. This is

based upon the fact that according to the testimony of the prosecution there was but one act of intercourse, which was had by force at the time of her menstrual flow, and more than forty weeks prior to the birth of the child. Her testimony was that it occurred about the last of July or the first of August, 1883. The child was born on the 30th day of May, 1884, making the period of gestation, if she was correct as to the date of the intercourse, about three hundred and four days, or about twenty days longer than the normal period of gestation. The testimony of a number of experts was taken and it was shown that while the probabilities would be against the truth of the statements of defendant in error, yet such was by no means conclusively so. Also that pregnancy would probably follow from the intercourse testified to under the circumstances shown to have existed, and that the period of gestation was not extended beyond what medical science and experience proves to be possible. These questions were properly submitted to the jury under proper instructions. They were fully and carefully examined. Physicians of high standing in their profession were before the jury, and, in the main, supported the testimony of the complainant (although somewhat conflicting), to the extent that the facts of which she testified were not impossible. We cannot say that the verdict was not supported by sufficient evidence.

The judgment of the district court is affirmed.

**JUDGMENT AFFIRMED.**

**THE other judges concur.**

## EX PARTE JOHN P. MAULE.

1. **Misdemeanor: COMPLAINT.** A complaint charging the commission of a misdemeanor under the criminal law of the state will be held sufficient when collaterally assailed, if it contains sufficient to show a violation of law, and will not be held to be vitiated because it contains surplusage or redundant matter.
2. ———: **JURISDICTION OF COUNTY JUDGE.** When a defendant is arrested upon a complaint filed with the county judge charging a misdemeanor, and such defendant upon arraignment before such judge pleads guilty to the charge preferred, the county judge has authority, under section 313 of the criminal code, to render judgment of a conviction, within his jurisdiction, and enforce the same by imprisonment, as in other cases of a conviction of misdemeanor.
3. ———: ———: **MITTIMUS: HABEAS CORPUS.** In such case where the mittimus correctly recites the judgment, but commands the jailer to receive the defendant into the cell of the common jail of the county, but there is no allegation in the petition for *habeas corpus* that he is imprisoned in a cell or otherwise than prisoners are ordinarily confined, a writ of *habeas corpus* will not issue; the confinement not being shown to be illegal.

**HABEAS CORPUS.**

*John P. Maule, pro se.*

*William Leese, Attorney General, contra.*

REESE, J.

This is an application for a writ of *habeas corpus*. From the petition it appears that a complaint was made before the county judge of Fillmore county, charging James E. Mack and others with a violation of chapter 50, Compiled Statutes of 1885, in the sale of intoxicating liquors without a license. A warrant was issued for his arrest, and upon being brought before the county judge he plead guilty to

the charge, and under the provisions of section 313 of the criminal code he was fined the sum of \$100.00, and in default of payment was committed to the jail of the county, there to be confined until fine and costs were paid. A mittimus was issued by the county judge in the usual form, setting out the judgment as above stated, but commanding the jailer to receive said Mack into his custody in the "cell" of the jail of said county, there to be confined until the said fine and costs were paid, etc.

Some complaint is here made as to the form of the complaint filed with the county judge. That it is inartistically and unskillfully drawn cannot be questioned, as it is literally *stuffed* with repetitions and unnecessary averments, but it clearly charges a violation of law, and when the surplusage and redundant matter are eliminated there is sufficient to support a conviction.

It is next claimed that the county judge had no jurisdiction to pronounce judgment. This jurisdiction is conferred by section 313, *supra*, which is as follows:

"When the complaint is for a misdemeanor only, of any grade of punishment whatever, if the cause is pending before the probate (county) judge of the county, before whom the defendant enters a plea of guilty to the complaint, it shall be lawful for such judge, in his discretion, to render judgment of fine or imprisonment, or both, according to the law of the case, and pass sentence accordingly, and enforce the same according to law."

There is no suggestion that the jurisdiction given by this section and assumed by the court is in violation of the provisions of section 16, article VI. of the constitution, or that the judgment rendered is in excess of the powers of the county judge. Therefore the judgment is not for this reason void.

The principal contention is, that the clause in the mittimus requiring the keeper of the common jail to receive the convicted party into the *cell* of the jail of the county is in

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Yates v. Kinney.

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violation of his rights, and that the imprisonment is therefore unlawful. It is not alleged that this clause of the mittimus is followed in any respect. Indeed such an assumption is clearly negatived by the petition. The judgment is that he be confined in the jail of the county until the fine and costs are paid, and is in the usual form. This judgment is correctly recited in the mittimus, and the petition alleges that he is "confined in the common jail of said county." The imprisonment, therefore, is not unlawful, and the writ will be denied.

WRIT DENIED.

THE other judges concur.

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33	854
19	276
50	684
50	733

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**WILLIAM J. YATES, APPELLANT, v. MARTIN KINNEY  
AND P. C. CASEY, APPELLEES.**

1. **Landlord and Tenant: TENANT HOLDING OVER.** Where a lessee of agricultural lands on shares for the term of one year holds over for another year by the consent of the landlord no different or other contract as to the terms of the lease having been made, in an action for rent the law will imply an agreement to hold for the year upon the terms of the prior lease.
2. ———: **MORTGAGE OF CROP BY TENANT.** In such case the tenant may mortgage his interest in the crop raised without the consent of the lessor, and the mortgagee will hold the title of the lessee to the mortgaged property, but subject to all the rights of the lessor, and such mortgage will be no violation of his rights.
3. **Referee: PRACTICE.** A conclusion of law of a referee, even if erroneous, upon an immaterial or unimportant question in the case, will not vitiate his report or require it to be set aside by the court to which it is returned, if the findings and conclusions are in other respects correct.

APPEAL from Fillmore county. Heard below before MORRIS, J., on exceptions to report of W. C. Sloan, referee.

*Billings & Donisthorpe and Ryan Brothers*, for appellant, cited: *Leland v. Sprague*, 28 Vt., 746. *Ponder v. Rhea*, 32 Ark., 435. *Chase v. McDonnell*, 24 Ill., 236. *Harrison v. Ricks*, 71 N. C., 11. Bingham Sales, 180.

*John P. Maule*, for appellee Kinney, cited: Taylor's Landlord and Tenant, 8th ed., § 58. *Schuyler v. Smith*, 51 N. Y., 313. *Poessenecker v. Weatherby*, 16 Neb., 95.

*J. H. Rushton*, for appellee Carey, cited: Jones' Chattel Mortgages, §§ 141, 143. *Arques v. Wasson*, 51 Cal., 620. *Butt v. Ellett*, 19 Wall., 544. *Robinson v. Kruse*, 29 Ark., 575.

REESE, J.

This was an action in equity to restrain the defendant Kinney, a tenant of plaintiff, and defendant Carey, a mortgagee, by chattel mortgage of the crops, from committing waste and appropriating to their own use the crops grown on the land of plaintiff during the year 1884 by the cultivation of defendant Kinney.

It appears from the pleadings and evidence that Kinney was a tenant of plaintiff during the year 1883 under a written lease, of which the following is a copy:

"This indenture made this 26th day of November, 1882, W. J. Yates, party of the first part, and Martin A. Kinney, party of the second part, witnesseth: that the said party of the first part in consideration of the covenants of the said party of the second part hereinafter set forth do by these presents lease to the said party of the second part the following described property, to-wit:



"The north  $\frac{1}{2}$  of section 30, township six (6), range two (2) west, all of the broke land except the north-west 40 in timber.

"To have and to hold the same to the said party of the second part from the 6th day of November, 1882, to the 26th day of December, 1883. And the said party of the second part, in consideration of the leasing the premises as above set forth, covenants and agrees with the party of the first part to pay said party of the first part as rent for the same the sum of — dollars, payable as follows, to-wit:

"One-third of all the grain that is raised on the above land—the small grain in the half-bushel any place on the farm that the party of the first part may ask, the corn to be husked and delivered on the farm any place that the party of the first part may direct. The crop is considered the property of the first party until it is divided, and it is further agreed between the parties that the corn is to be husked by the 25th day of December, 1883, and the small grain to be threshed as soon as it is fit.

"The said party of the second part further covenants with the said party of the first part that at the expiration of the time mentioned in this lease, peaceable possession of the said premises shall be given to the said party of the first part in as good condition as they are now, the usual wear, inevitable accidents, and loss by fire excepted, and that upon the non-payment of the whole or any portion of the said rent at the time when the same is above promised to be paid, the said party of the first part may, at election, either distrain for said rent due or declare this lease at an end and recover possession as if the same was held by forcible detainer, the said party of the second part hereby waiving any notice of such election or any demand for the possession of said premises and any demand for the payment of said rent or any installment thereof. And it is further covenanted and agreed between the parties aforesaid that if, at the expiration of the term hereby created, the said lessee shall re-

main in possession of said premises or any part thereof, he shall be considered and treated as a tenant at sufferance of said party of the first part at the monthly rental of ——. The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease.

“Witness the hands and seals of the parties aforesaid.

“W. J. YATES. [Seal.]

“MARTIN E. KINNEY. [Seal.]”

It is also undisputed that defendant retained possession and cultivated the land during the year 1884.

Plaintiff alleged in his petition that on the 25th day of March, 1884, and while defendant was in possession of the land, a new contract of lease was entered into, verbally, by which it was agreed that for the use of that part of the farm on which a corn crop was to be raised the defendant was to pay 1,950 bushels of corn, to be husked and cribbed; and for that part of the land upon which small grain was grown he was to receive one-third of the product, delivered in the bushel on the farm; but that it was inconvenient to execute the written lease at that time, and it was to be written and signed afterwards; and when presented to Kinney about the first of July, 1884, he refused to sign it. It is alleged that Kinney had executed mortgages to Carey and others upon his undivided interest in the crop to secure near eight hundred dollars of indebtedness, and that Kinney was gathering the corn and converting it to his own use; that he had a large number of hogs running at large in the grain, committing great waste and irreparable damage; that he was insolvent; that he had failed to cultivate the land as required by the contract, by which the farm was damaged and the crops deficient; that he had failed to cut and care for a portion of the small grain grown on the land; had torn down and converted certain buildings standing thereon; had used fruit to a large amount in value which had been reserved to plaintiff; that stock of various

kinds was running at large on the land injuring the trees and shrubbery as well as the crops, and that unless restrained he would continue to waste and destroy the crops, etc. It is further alleged that Carey, unless restrained, will take possession and convert the mortgaged property under the terms of his mortgage. Prayer for injunction against both defendants and for judgment for \$847.00 damages and costs against Kinney, and decree for his portion of the crop as against both defendants.

Kinney answered, denying all the allegations of the petition as to waste and destruction or conversion of the crops or other property; sets up his lease for the year 1883, under the contract hereinbefore set out, and alleging that during the existence of the lease of 1883, and while in possession of the land under the same, he rented the land for another year, and that under and by virtue of said second agreement he continued upon and had possession of the farm, putting in and cultivating the crops, etc.; that he did not sign or agree to sign the contract of lease set out in plaintiff's petition, and that it was the agreement between them that the conditions and terms of the lease for 1883 were the conditions and terms under which he was to farm and cultivate the land during the year 1884, and no other, the lease of 1883 being extended for another year. The execution of the mortgage to Carey on his interest in the crops is admitted.

Carey answered, admitting the execution of the mortgage and asking that his interest in the portion of the crop covered thereby be protected, etc. The reply was a general denial.

The cause was referred to a referee for findings of fact and conclusions of law. The referee took the testimony, and reported his findings as follows:

"FINDINGS OF FACT.

"1st. That on the 26th day of November, 1882, the plaintiff, William J. Yates, leased in writing the north

half of section 30, township 6, range 2 west, in Fillmore county, to defendant Martin Kinney, for the term of one year from the said 26th day of November, 1882.

"2d. That by the terms of said lease defendant Kinney was to pay as rent to plaintiff one-third of all grain raised on said farm, the small grain to be delivered on said farm any place the plaintiff might direct, in the half bushel, and the corn to be husked and delivered any place on said farm plaintiff might require it to be delivered.

"3d. That defendant entered upon the said land and farmed the same for the year 1883, under and by virtue of said lease.

"4th. That during the last of August or first of September, 1883, the plaintiff and defendant had a conversation concerning defendant having said land for the year 1884, and that it was then and there agreed between plaintiff and defendant Kinney that defendant could have the said place for the next year, to-wit, 1884, and that no terms were then agreed upon.

"5th. That defendant Kinney remained on said land and farmed the same for the year 1884.

"6th. I find that on the 25th day of March, 1884, plaintiff requested defendant Kinney to come to his house in Geneva, that plaintiff wanted to make a change in the lease, and that defendant Kinney went to the house of plaintiff and the proposed change was talked over and discussed, and that no change in the terms of the lease or new lease was then consummated; and I further find no consideration was proposed to be given defendant for the proposed new lease.

"7th. I find that plaintiff drew up a lease embodying the terms proposed by him on the said 25th day of March, 1884, and afterward, to-wit, on the 5th day of July, 1884, plaintiff presented the said lease to said defendant to sign, which said defendant refused to do, and that said lease so presented is not signed by plaintiff.

"8th. I find that one-third of all grain raised on said land has been delivered to said plaintiff or set apart to him for the year 1884, except one-third of twenty acres of oats.

"9th. I find that defendant was prevented from harvesting said oats by the extreme wet weather, and I further find defendant used due diligence in attempting to harvest the same, and that the said oats would average about thirty bushels to the acre, and that defendant's share of the same would have been about 200 bushels, had the same been harvested.

"10th. I find neither at the time of the filing of the petition, nor at any time since the filing thereof, nor before the filing thereof, has defendant permitted his hogs or any stock of any kind to run at large on said farm.

"11th. I find that no damage is found to have been done to the crops, the orchard, the meadow, or any other property of plaintiff, or any property in which plaintiff has any interest, by stock or by reason of stock of defendant running at large.

"12th. I find that at the time of the filing of this petition the defendant Martin Kinney was not converting the whole of said crop to his own use, or any more of said crop than belonged to him as his share of the crop.

"13th. I find there is no evidence in the record to show that defendant Kinney is insolvent.

"14th. I find that twelve acres of said farm was fresh broken prairie, and that the same was not rotted and was untillable, and by reason thereof defendant failed to cultivate the same.

"15th. I find that there is no evidence to sustain the allegation that the defendant has torn down, destroyed, or burnt up any stable or part thereof, or permitted the same to be done.

"16th. I find that the defendant Martin Kinney has not used, destroyed, or converted to his own use any of the fruit grown on the farm for the year 1884.

"17th. I find that defendant Kinney has done no waste on said farm or permitted none to be done, and that no waste was being committed at the time of the filing of the petition in this case.

"18th. I find that on the 22d day of March, 1884, the defendant made, executed, and delivered to P. C. Carey, one of the defendants herein, a chattel mortgage on two-thirds of the crop raised on the said farm for the year 1884, to secure the sum of \$686.90.

"19th. I find that on the 31st day of May, 1884, defendant Kinney made, executed, and delivered to defendant P. C. Carey a chattel mortgage to secure the sum of \$106.50."

"CONCLUSIONS OF LAW.

"I. The defendant Kinney is holding over after the expiration of the lease of November 26th, 1882, and under and by virtue of which he farmed the same land for the year 1883, with the knowledge and consent of plaintiff.

"II. In the absence of any agreement as to terms of rental, his holding will be governed by and controlled by the terms of the lease for the previous year.

"III. Having permitted defendant Kinney to occupy said premises under an agreement that he could have the place for the year 1884, and without changing the terms of said lease for the previous year at the time such agreement was made, plaintiff cannot impose on the defendant other terms more burdensome without a new consideration therefor.

"IV. The oats having been destroyed by inevitable accident, defendant Kinney cannot be held responsible therefor.

"V. The defendant P. C. Carey has a lien on said two-thirds of the crops raised by defendant Kinney for the sum of \$686.90 and the sum of \$106.50 secured by his respective mortgages.

"VI. There were no grounds for suing out an injunction in this cause, and the same should be dissolved.

"VII. That this bill should be dismissed at the cost of plaintiff. All of which is respectfully submitted.

"W. C. SLOAN, Referee."

Upon the findings and conclusions being filed in court, the plaintiff filed his exceptions thereto as follows:

"The plaintiff excepts to the findings of law and of fact by the referee, for the following reasons:

"1st. In the sixth finding of fact by the referee he finds that on March 25th, 1884, no new lease was then and there consummated by and between plaintiff and defendant, and that there was no consideration proposed to be given defendant for the proposed change or new lease, when in fact the record which the referee has made of the testimony of this case shows that the terms of rental of the land in question for the year 1884 were agreed upon, and said evidence also shows that plaintiff and defendant also agreed to reduce the evidence of their contract to writing on or shortly after March 25th, 1884.

"2d. The referee in his eighth finding of fact says, that one-third of all the grain raised by defendant in the year 1884 has been delivered or set apart to plaintiff, when in fact the evidence taken by the referee shows that the testimony of one of defendant's witnesses, and also by defendant, that a part of the corn has not been delivered or set apart to plaintiff in any way.

"3d. The ninth finding of fact by the referee is, that defendant was prevented from harvesting the oats because of wet weather, when the testimony of defendant is, that he harvested and threshed some of said oats and they were nice and plump, and that he stopped cutting said oats because he thought they were too green; and the testimony of defendant's witness Porter is, that he had been cutting with a header right along up to a certain day when he at-

tempted to cut the oats in question and that the oats were then dead ripe—then the evidence shows that after that the rain spoiled the oats.

“4th. The tenth and eleventh findings of fact by the referee show that no damage to property, orchard, or anything else of plaintiff, by stock, has been proven in the trial of this case, when the evidence of damage to the property of plaintiff is in record made by referee and undisputed.

“5th. The twelfth finding of fact by the referee is, that the defendant was only taking such part of the crop as was his at the time of the filing of the petition, when the evidence of both plaintiff and defendant shows that the whole of the crop was the property of the plaintiff until it was divided, and the evidence of defendant is, he had sold two-thirds of it to P. C. Carey by chattel mortgage, and that a portion was being gathered and fed there is no dispute.

“6th. The thirteenth finding of fact by the referee, that twelve acres of the said farm was fresh broken prairie and untillable, is not supported by sufficient evidence; the evidence showing that part of the same has been plowed or backset by defendant in the fall of 1883, and that it was broken in the year 1883.

“7th. The fifteenth finding of fact by the referee is not sustained by the evidence; the referee finds that defendant has not converted any of the fruit in question to his own use, when defendant swears that he did take part of the same.”

Plaintiff objects and excepts to the conclusions of law by the referee for the following reasons:

“1st. That the first conclusion of law in which the referee finds that as a matter of fact the holding of the defendant of the lands in question was with the knowledge and consent of plaintiff, which fact is nowhere proven by the evidence.

“2d. The third conclusion of law by the referee, that because the defendant occupied the premises under an arrangement made August or September, 1883, that he could



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Yates v. Kinney.

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have the land, in 1884, and no terms being then agreed upon, that after August or September, 1883, a new contract could not be made without a new consideration, or as near as I can understand the said conclusion, it seems to hold that because plaintiff, in August or September, 1883, told defendant that he could have the land in question for 1884, and agreed upon the terms at that time, that they cannot afterwards fix and agree upon terms, because the law has presumed at some time or other that because no terms were agreed upon they would be the same as for the previous year, and the conclusion as based upon the findings of fact and the other conclusions of law, would seem to hold a tenancy at will or for years could not be changed into a tenancy for a specified time or term.

"3d. The fourth conclusion of law by the referee being founded and based on an erroneous finding of fact is not applicable.

"4th. The sixth conclusion of law by the referee, that there were no grounds for suing out the injunction in this case, is not based on correct findings of fact, the facts claimed by both the plaintiff and defendant are that the whole of the crop was the property of plaintiff, and the undisputed evidence is that defendant was using and converting part of said crop to himself, and the evidence of defendant shows that he had sold and transferred two-thirds of said crop and the right of possession thereof to P. C. Carey, which was a violation of the rights of plaintiff, and would cause great and irreparable injury to plaintiff."

The exceptions were overruled and the report confirmed, the temporary injunction was dissolved and the cause dismissed at plaintiff's cost. The cause is brought to this court for review by appeal.

There are ten assignments of error which are:

"I. The referee erred in finding an express lease created by the conversation defendant claims he had with plaintiff in the latter part of August or first of September.

" II. The referee erred in finding as a fact that defendant Kinney under the evidence was not insolvent.

" III. The referee erred in finding that no damage was done the crop by defendant's stock running at large.

" IV. The referee erred in finding that the mortgages executed to Carey were no violation of the property rights of plaintiff in the grain.

" V. The referee erred in finding that a new contract of lease could not be made in March, 1884, without a new consideration.

" VI. The referee erred in finding there were no grounds for suing out the injunction herein.

" VII. The referee erred in recommending that the injunction be dissolved.

" VIII. The court erred in rendering judgment in accordance with the findings and recommendations of the referee.

" IX. The court erred in overruling plaintiffs several exceptions to the report of the referee.

" X. The court erred in not making perpetual the injunction herein granted, upon both the referee's report and the evidence submitted."

It is not deemed necessary to notice all these assignments of error in their order, but we must be content to say generally, as to the second and third, that we have carefully read all the testimony submitted by plaintiff in his abstract, which is doubtless correct, and find that there was sufficient to sustain these findings of fact.

As to the first assignment, there was testimony from which the referee could find that prior to the expiration of the first lease the parties made an agreement that Kinney should have the land for the year 1884, beginning at the expiration of the lease of 1883—November 26—and ending November 26, 1884. That Kinney did fall plowing in 1883 for the next year's crop, hauled out manure, put up hay, and in the spring of 1884 sowed his wheat and oats.

During this time no suggestion was made by plaintiff that he desired the possession of the property nor that the possession of Kinney was not entirely satisfactory to him. He does not claim to have approached Kinney upon the subject until the 25th of March, 1884, four months after the expiration of the prior lease. Up to that time Kinney insists he was holding under the terms of the prior lease. Plaintiff does not claim that any other contract or agreement had been made. He had never demanded the possession of the premises nor given notice to Kinney to quit.

In *Schuyler v. Smith*, 51 N. Y., 809, the court says: "The law is too well settled to be disputed that where a tenant holds over after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of a prior lease," citing authorities.

In *Taylor's Landlord and Tenant*, sec. 58, it is said: "When a landlord suffers the tenant to remain in possession after the expiration of the original tenancy, or lets in a tenant under a void lease, and receives rent, thereby establishing a new tenancy from year to year, the law presumes the holding to be upon the terms of the original demise subject to the same rent and to all the covenants contained in the original lease, so far at least as they are applicable to the new condition of things," citing a number of cases. This action being one for the collection of rent and not one in which the right of possession is drawn in question, it seems clear that the decision of the referee upon that point was correct, there being sufficient evidence as to the facts to sustain it.

The question presented by the 4th assignment of error has been virtually decided by this court in *Dworak v. Graves*, 16 Neb., 706, in which it was held that a tenant might assign his lease or sell his share of the crop raised upon the leased premises without the consent of the lessor, unless prohibited by the terms of the lease, and that such assignment or sale would carry to the assignee or purchaser the

rights of the lessee under the contract or lease. It would logically follow that the same rights or interests might be mortgaged. But it is insisted that, as by the terms of the lease, the crop is considered the property of plaintiff until it is divided, a different rule would have to be applied, and that no such transfer or mortgage could be made which would not violate the property rights of plaintiff. It is evident that Kinney had some interest in the crops. The fact that the extent of that interest depended upon his compliance with the terms of his lease would not deprive him of the right to sell or mortgage it. By the terms of the mortgage if by no other means of knowledge, Carey had notice that Kinney's interest was an undivided one and he was charged with notice of the rights of plaintiff. He could take no higher or greater title than Kinney had, and could assert no right as against plaintiff that Kinney had not.

The 5th assignment of error, perhaps, refers to the third conclusion of law as found by the referee in connection with the sixth finding of fact. The finding of the referee is substantially that defendant Kinney was, on the 25th of March, 1884, holding over under the lease of 1883, by virtue of his agreement and possession, and that this being the case, there being no change in the terms of the lease, the plaintiff could not impose on the defendant more burdensome terms, to which he had not agreed, without a new consideration therefor. But suppose the conclusion was as claimed by plaintiff. It would not follow that the report must for that reason be set aside, even if erroneous. The finding of the referee as to the facts was, that "no change of the terms of the lease was \* \* consummated" on the 25th day of March, 1884, and that when the new lease was presented to Kinney for his signature he refused to sign it. Therefore the rights of the parties were unchanged, and the question of consideration becomes an unimportant element in the case.

As the sixth, seventh, eighth, ninth, and tenth conclu-

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Otoe County v. Heye.

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sions of law would properly follow, or result from the prior findings which we have held to be correct, they need not be discussed here.

It follows that the decision and decree of the district court was correct. It is therefore affirmed.

**DECREE AFFIRMED.**

THE other judges concur.

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**OTOE COUNTY, PLAINTIFF IN ERROR, v. FREDERICK HEYE ET AL., DEFENDANTS IN ERROR.**

1. **Roads: DAMAGES ON OPENING.** Where a public road is located alongside of a railway previously constructed and in operation, the jury in awarding damages to the land owner for such public road cannot consider as an element of damage the fact that teams passing along such road might be frightened by the cars and run away and injure this land owner's fences or crops.
2. ———: ———: **INSTRUCTION TO JURY.** The jury should be instructed as to what constitutes the proper elements of damage and an instruction that the jury should allow the land owner "any incidental damages sustained by reason of the location of the road," etc., without stating what constitutes incidental damages, is liable to mislead the jury.

ERROR to the district court for Otoe county. Tried below before POUND, J.

*John C. Watson*, for plaintiff in error, cited: *Wagner v. Gage County*, 8 Neb., 242.

*Frank T. Ransom*, for defendants in error, cited: 3 Sutherland Damages, 434. *Bigelow v. R. R.*, 27 Wis., 478. *Bland v. Hixenbaugh*, 39 Iowa, 532. *M., K. & T. R. R. v. Haines*, 10 Kan., 439. *Fowler v. R. R.*, 107 Mass., 352.

MAXWELL, CH. J.

In August, 1884, a petition duly signed was presented to the county commissioners of Otoe county praying for the location of a public road commencing at the north-east corner of the south-east quarter of section 22, township 8, range 13 east, running thence west on north line of said section to its intersection with the line of the Nebraska railway, thence along the line of said railway to the western line of said quarter section at Summit Station. The road was located as prayed, whereupon the defendants in error filed a claim for damages, and were allowed \$115, from which award they appealed to the district court.

On the trial of the cause in the district court the jury returned a verdict in their favor for the sum of \$250, upon which judgment was rendered. The county brings the cause into this court by petition in error.

The testimony tends to show that the railway had been built and was in operation when this road was located and it is to be presumed that the owner of the land in controversy when the railway was located and constructed had received compensation for all injuries caused by the location and operation of said railway. Such damages, therefore, as the railway company was liable for upon condemning the right of way cannot be considered in estimating the amount due for damages to the same tract by reason of the location of a public road alongside of such railway. In other words, the railway company is required to pay for the land actually taken and for such incidental damages to the residue of the tract as tend to diminish its value. What elements enter into the computation of such damages need not now be considered as the question is not before the court.

The court gave the following instructions to the jury:

"In addition to the actual value of the land you should allow him any incidental damages sustained by reason of

the location of the road, if any such from the evidence you find he has sustained, such as building and maintaining additional fences, made necessary by the location of the road, as well as *any other facts which you may find from the evidence that would in any way depreciate the value of the land or farm* by reason of the establishment of the road complained of, and in no event can you reduce the damages so sustained by plaintiff on account of any benefits sustained by him in common with his neighbors on account of the establishment of the road complained of." Also the following: "If you find for the plaintiff you will take into consideration the value of the whole tract of land over which the road is located before the portion thereof was taken for a road and its value after the taking, and also whether the horses and teams driven along the located road are liable to be frightened by engines passing along the railroad mentioned in the evidence, and to run away and to destroy property, such as crops and fences on the land, and any general or particular inconvenience to which the plaintiffs will be put by reason of the locating of the road and the taking of the land for the use thereof. The plaintiffs are entitled to be compensated not only for the value of the land appropriated, but also for the incidental injury to the value of the residue."

These instructions were duly excepted to, and the giving of the same is now assigned for error.

Some of the witnesses had testified that teams passing along the proposed road were liable to be frightened by passing trains and would run off over the defendant's grain or grass, causing damage. Also that teams frightened in this manner are liable to break or injure the fence if erected, unless it was very substantial, and one witness, after estimating the damages at a large sum, adds, "to say nothing of the embarrassment caused by travelers and the public, which is very embarrassing. I have had it." Cross-examined: "They will steal your chickens, carry off your eggs,

hatchet—anything. But in this instance I base the damage on the value of the land and cost of fencing," etc.

The objection to the instructions complained of is in submitting to the jury the question of mere possible damages not resulting from the appropriation and legitimate use of the road, as "any incidental damages sustained by reason of the location of the road," "whether the horses and teams driven along the public road are liable to be frightened by engines passing along the railroad mentioned in the evidence, and to run away and destroy property such as crops and fences on the land." Such damages are too remote and uncertain to be considered, and are not within the rule stated in the cases cited by the defendant in error. *Snyder v. W. U. R. R. Co.*, 25 Wis., 60. *Biglow v. W. W. Ry. Co.*, 27 Wis., 478. *Parks v. W. Cent. R. R. Co.*, 33 Wis., 413.

In those cases the damages allowed were such as presumably resulted from the location, construction, and operation of the railroad—not such as were liable to result from other causes.

The instructions are objectionable also, because too indefinite. The jury should be told in clear and direct language what may be considered by them in making up their verdict and not be left to conjecture as to what constitutes incidental damages. For error in giving the above instructions the judgment of the court below is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The other judges concur.



PHOEBE ANN MUNSON, APPELLEE, V. THOMAS W.  
CARTER, APPELLANT.

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19	436
19	293
27	176
19	293
42	32

**Contract:** COERCION IN MAKING: EQUITY JURISDICTION, Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence.

APPEAL from Adams county. Heard below before MORRIS, J.

*Dilworth, Smith & Dilworth*, for appellant, cited: *Mehlhop v. Pettibone*, 54 Wis., 652. *Schultz v. Culburtson*, 46 Wis., 318. 49 Id., 122.

*J. B. Cessna*, for appellee, cited: *Parsons Contracts*, 392. *Washburn Real Prop.*, 261. *Eadie v. Slimmon*, 26 N. Y., 9. *Jordan v. Elliott*, 22 American Law Reg., 190. *Foshay v. Ferguson*, 5 Hill, 154.

MAXWELL, CH. J.

In March, 1884, the plaintiff filed her petition in the district court of Adams county, wherein she alleged that on the 25th of September, 1875, she became the owner of the south-west quarter of section twenty, township five north, range 11 west, in Adams county. That it was purchased with money belonging to her and advanced by her. That on May 23d, 1883, she was compelled to deed the same to defendant and take a life lease from him—she was then 65 years old and in feeble health. She was to have all the personal property on the land except one span of mules and certain blacksmith tools, and to have one-third of the then crops on the land. That defendant has failed and refused to comply with his part of the agreement, and

has removed by force a large part of the personal property and grain on the land. The land was free from incumbrance, and worth \$3,500.00. That she was not in debt to defendant in any sum ; that the deed was delivered without any consideration. That when the deed was executed and the life lease accepted, the deed was procured by fraud, force, and superior will and intelligence practiced upon her, with the intention of cheating and defrauding her, by defendant. That she was under no obligation to make said deed, and that it was without consideration. That the acknowledgment was procured from her through coercion, force, and fraud, and was not her voluntary act. Prayer for reconveyance, and that the title be quieted in her.

To this petition the defendant filed his answer, stating : " That in 1873 the plaintiff and her husband, being in feeble health and advanced age, desired to make arrangements for their support in their declining years, did enter into a contract with defendant by which it was agreed that defendant should take care of and support the plaintiff and her husband ; that in consideration thereof the plaintiff advanced \$1,500.00 to purchase the land in question, and defendant did purchase the land, caused it to be deeded to plaintiff, and plaintiff then agreed with defendant that in consideration of his taking care of and maintaining plaintiff and her husband, and of taking care of the land and improving the real estate, that the said land and all other property which the plaintiff then owned and held, together with the increase of personal property, should go to and belong to the defendant.

" That in pursuance of said contract the defendant entered upon and took care of said real estate and personal property and continued to do so up to May 23d, 1883 ; that from the time of making said contract up to the 19th day of July, 1882, the said Charles Carter, the plaintiff's husband, lived with defendant, and died on said 19th day of July, 1882, and that from the time of making said contract to the time

of his death he was unable, from bodily infirmity, to do anything towards the support of himself and the plaintiff.

"That from the time of making said contract to the death of said Charles Carter defendant took care of and supported the plaintiff and her husband, and after the death of the said Charles the said defendant continued to support plaintiff, as he had agreed to, up to May 23d, 1888.

"That since the making of said contract defendant has employed all his time and spent his money and labor in improving the land and in the support of plaintiff and her husband, and during said time has placed valuable and lasting improvements upon said premises to the value of \$1.200.00, and has paid off a mortgage upon the premises to the amount of \$400.00, and has paid out for plaintiff and her husband for their support and expenses, under said contract, about \$1.600.00, all paid out by defendant under said contract.

"That all the earnings and labor of defendant for eight (8) or nine (9) years had been expended in support of plaintiff and her husband and in making valuable and lasting improvements on said land. For a second defense the defendant alleges that the plaintiff, desiring to re-marry, and not to have defendant support her any longer, and desirous of settling with and remunerating defendant for the labor done upon the land and taking care of and support of her and her husband, she did agree with this defendant to execute and deliver to him a deed for said premises, and the defendant executed to her a life lease on the same premises.

"That on May 23d, 1888, the said plaintiff, in accordance with said settlement, did, of her own free will and accord, execute and deliver to defendant a deed to said premises, and defendant executed and delivered to plaintiff a life lease of said premises, the consideration of said deed being the matters and things heretofore set forth, and a full settlement of all matters and claims and demands

between defendant and plaintiff; that a full and complete settlement of all matters and controversies was made between plaintiff and defendant upon May 23d, 1883.

"That about May 23d, 1883, plaintiff was married; and answer denies all allegations contained in the petition not admitted or denied."

The reply is a general denial.

The plaintiff, in her testimony, after stating that the land in question was purchased and paid for with her money and that she had lived with her son for several years, testifies as follows:

"He had no property except what he raised on that farm. He would haul off the hogs and grain and he kept the money, and what I ate and drank was furnished me, and that was about all I did have. My husband died July 19th, 1882, of a cancer; there was not to exceed \$5.00 spent for him; I took care of him night and day; would get up to lift him, and my son did not; I had to take care of him and change him; he would never lift him and tend him. In the winter Mr. Carter had a pre-emption; I wanted to come up and see something about it, and the means, he had six months, and he got the property."

Q. Tell us about this deed, the deed that you made to the defendant.

A. In the first place he tried that before his father died. He fetched him a deed that he got made out in the fall of 1881, and I saw Smith's name on the papers. I accused him of having a mortgage on the place, and he said he did not. Finally, in 1882, he fetched it along; he asked me to sign it and to look at it; I told him I would not do it, and I sprang for it and he put it into the stove. There was nothing more said about it until 1883. I wanted some money. I sold a horse the year before and took a note for part and the other I let him have, and I demanded it to go east with; he hauled off a couple of loads of hogs and fetched me the money and said, "Now, will you give me

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Munson v. Carter.

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a deed to this place?" and I said, "No, sir, I will never sign a deed to this place so long as my head is hot." He said, "I have an injunction against you and will have you arrested in a day or two." He said "I want you to go to Hastings with me to-morrow;" and in the morning, asked me if I was going with him this morning, and I says, "I guess not," and he says the papers are in the officer's hands and he would have them served; that I could not go to Illinois; could not start out of the county; he had an injunction on everything I had and he would have it; he said he was going to have the place; had told me before he would be damned if he would ever leave the place and he was going to have it, he would be damned if he would ever leave it. I used to try to get him to go on his homestead after he had proved up on it. I cried nearly every night till I could not sleep, my health was poor. He said everything a man could say to a mother; when I was fussing with him about the pre-emption he called me a damned stinking bitch.

Q. What did he say to you in reference to your signing the deed?

A. He did not say much of anything, he would sit right in front of me.

Question by the court. When was this deed made?

A. The 23d day of May, 1883. I was sixty-seven years old the 19th of February last. In the spring of 1883, when this deed was made, my health was poor; was taken sick the October before with a disease that affected my nerves and my head; they call it Bright's disease. I was very poor and sick until after I married Mr. Munson. My husband died on May 30th, 1883. About that time my mind was wavering; I could not keep my mind at times when he would go to talk to me. I would be so sick I could not sleep, and cry and do nothing. It affected my health when I would cry; he would have me stop, and say the next thing there will be a doctor's bill to pay. At the time

of signing the deed he said that I would have to go ; that the papers were in an officer's hands and I would be arrested if I did not sign them. I was afraid of him for two years. The neighbors would come to me and tell me what he would say he would do and was going to do. I got into the wagon with him and he brought me to town. He said he was going to have some one else there in the house, it was too lonesome for just him and me there. I was in fear of him all the time. He brought me in that morning. I signed the deed at Mr. Work's office; he was with me when it was done; Mr. Work made out the writings and Thomas sat right in front of me; we were alone, was but one other man in and he went right out again; I was in fear and trembling; there was something said, and he says and damned and said, well, if it has to be done, it has to be done.

By the court. What was the consideration of the deed, what did you get for it.

A. I most forget what was in the writing.

Q. Did you get anything for it?

A. I was to have one-third the crop (and that life lease) that year and so much stock with the kitchen furniture and everything of the kind.

The son, in his testimony, does not deny the essential facts stated by the mother. Can a deed thus obtained be sustained?

In *Whelan v. Whelan*, 3 Cow., 537, Whelan, a man 74 years of age, owning considerable real estate, the father of seven children, and whose wife was sickly and irritable, was troubled for several years with dissensions among his children about the management of his property, the wife taking part with five of the children on one side, against the father, and William and John, two of the sons, taking part with the father and managing his farm. The husband and wife separated, and an action being afterwards brought against the husband for his wife's support, William told his father that if he had anything to give him he

wished to know it, otherwise he would abandon the farm; that as his father and mother were acting they would soon have little enough for themselves; that thereupon it was agreed that the father should execute a deed of the farm to the two sons named. The court say (page 573): "The question here arises, what induced the appellant *at this time* to divest himself of all his property? The answer is obvious—his fears that his estate would be swept away for debts contracted by his wife. It is scarcely necessary to say that the supposition was groundless. His wife had been at board 13 weeks. The demand was afterwards settled for \$25. A summons had issued to collect this small debt. This statement is enough to satisfy every mind that the appellant was bereft of ordinary understanding. If his ignorance and imbecility of mind were so great as to entertain such apprehensions for so slight a cause, it is evident he would become an easy prey to any designing knave who happened to possess his confidence." The court reviews the English cases up to the year 1824, and quotes with approval the language of Sir Samuel Romilly in *Huguenin v. Baseley*, 14 Ves., 273, in his reply, that "if it (the court) see that any arts or stratagems or any undue means have been used, if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him, if there be the least scintilla of fraud, this court will and ought to interpose; and by the exertion of such a jurisdiction they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it." The deed was canceled. Objection having been made in *Whelan v. Whelan* that the bill did not charge that the deed was procured by undue influence, the court say (page 571): "The bill charges the respondents with fraudulent artifices, management, and undue influence in obtaining

the deeds. It is, however, sufficient if from an examination of the whole bill the facts stated show that the respondents necessarily had undue influence or control over the appellant so that the parties did not treat on equal terms. The rule that requires everything essential to the appellant's right to be alleged is then satisfied. His equity will then appear and the court may administer the relief to which he is entitled."

In *Taylor v. Taylor*, 8 Howard, 183, a young lady just of age received a bequest of a large amount of property from a deceased uncle. Not long afterwards she wrote a letter to her parents in which she stated her belief that the bequest was intended for their benefit as well as hers and that she wished to dispose of it in accordance with the wish of the donor. A deed was thereupon prepared by an attorney employed by her parents, and executed by her, conveying the whole property to her mother for life, and after her death to her children then surviving and her heirs. The testimony showed that she had been treated with unkindness by her parents and was anxious at the time to obtain their consent to a marriage, which they withheld until after the execution of the conveyance. There was no testimony to show that her uncle intended to create a trust. The court held that the case came fully within the doctrine of *Huguenin v. Baseley*, and the conveyance was set aside, not only as to the mother, who had procured it, but to those to whom the remainder had been conveyed, although they had not procured the making of the deed. In *McCormick v. Malin*, 5 Blackf., 509, a man unacquainted with business and of feeble character was induced to sell a legacy of thirteen thousand dollars for four thousand five hundred dollars, by means of the influence acquired over him by the purchaser, who took advantage of his ignorance of affairs and eagerness to obtain the money at once to lead him to believe that the legacy was not worth a larger sum in hand and might not be paid for



many years. The court held that the transaction must be avoided on the ground of undue influence, if not of fraud. In *Whitehorn v. Hines*, 1 Mumford, 557, it was held that influence acquired by nursing and taking care of a young man of diseased body and enfeebled mind was sufficient to avoid a conveyance of his estate in consideration of a covenant to maintain and tend him during life, which had been imperfectly fulfilled.

In *Slocum v. Marshall*, 2 Wash. C. C. R., 397, a daughter was induced by her father to convey to him her reversionary interest in certain real estate after the expiration of his life estate as tenant by the curtesy, for the purpose of enabling him to make title to the property, with an understanding that he would hold it and its proceeds, if sold, for her benefit. The circumstances repelled the idea of fraud or improper motives on the part of the father, but there was no doubt the deed had been procured by the exercise of parental influence and had proved disadvantageous to the child, and this was held sufficient to render it voidable.

In *Sands v. Sands*, 24 Am. Law Reg., 544, a favorite son, taking advantage of his mother's affection, induced her to make a conveyance to him of all her estate, upon the assurance that the deed was in the nature of a will and would not take effect during her life-time. The mother was 73 years of age at the time of executing the deed, and greatly weakened in body and mind from sickness, so as to be incapable of transacting business. The deed was placed among her papers, and upon her recovery she destroyed it. It was held that the trial court erred in requiring the mother to execute another deed in place of the one destroyed, and in dismissing her cross-bill to have the conveyance set aside. To the same effect *Kleeman v. Peltzer*, 22 N. W. R., 793.

The leading case upon the question of undue influence and abused confidence is *Huguenin v. Baseley*, 14 Ves., 273

(2 Leading Cases in Equity and Notes), to which reference is made.

The result of the cases may be summed up, that where the coercion is not sufficient to amount to duress, but a social, moral, or domestic force is exerted on a party which controls the free action of his will and prevents any true consent in the making of a contract or the execution of a deed, equity may relieve against the same on the ground of undue influence even it would not be invalid at law. The doctrine of equity upon this subject is very broad, and as was said in *Smith v. Kay*, 7 H. L. Cas., 779, reaches every case and grants appropriate relief "where influence is acquired and abused or where confidence is reposed and betrayed."

In the case at bar the testimony shows beyond question that the mother was induced to execute the deed in controversy by the coarse language, threats, bluster, intimidation, and persistence of the son, and that it was not her voluntary act and deed.

This was sufficient to justify the court below in setting the deed aside. The evidence to establish the contract set up in the answer is too vague and indefinite to prove the same, and it is unnecessary to discuss that branch of the case.

So far as this record discloses, there is no excuse for the conduct of the defendant in his treatment of his aged mother. The property was purchased with her money, the result apparently of her industry, and it should be applied so far as may be necessary to her support and comfort during her declining years. The respect due from a child to parents and the desire to lighten the burdens and promote their happiness should be sufficient to prevent an unseemly wrangle over the parents' property or a desire to strip them of it while living. It is apparent that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOSEPH D. HAMILTON, APPELLANT, v. WHITNEY, CLARK  
& Co. ET AL., APPELLEES.

1. **Judgment Lien: ENTRY ON JUDGMENT RECORD.** Where a transcript of judgment from the county court was filed in the district court of the proper county, and the judgment record contained the names of the judgment debtor and judgment creditor arranged alphabetically, the date of the judgment, the amount of the same etc., a purchaser of real estate in that county from the judgment debtor is chargeable with notice of the judgment lien, notwithstanding the judgment may not be entered on the general index. *Mets v. State Bank*, 7 Neb., 165, distinguished.
2. **Appeal to Supreme Court: PRACTICE.** An appellee who has taken no steps to have a decree reviewed will not on the affirmance of the judgment in the supreme court be entitled to any greater relief than was awarded to him in the court below, unless his rights are so interwoven with those of the appellant that the court in adjudicating the appellant's rights must necessarily grant the appellee additional relief.

APPEAL from district court of Fillmore county. Heard below before MORRIS, J.

*Ryan Brothers*, for appellant.

*Condgon, Clarkson & Hunt*, for appellees.

MAXWELL, CH. J.

This is an action in equity to enjoin the sale of certain real estate upon execution. The plaintiff alleges in his petition that he is the owner and in possession of the north half of out lot nineteen of the town of Geneva, in Fillmore county; that he purchased said real estate at a public sale for taxes due and delinquent from one G. W. Lowry, and that on November 3d, 1881, said property not being redeemed, he received a tax deed for the same; that on the 3d day of October, 1881, said G. W. Lowry and wife made a

quit-claim of all their interest in said lot to the plaintiff for the consideration of \$300; that for a long time prior to January 11th, 1878, said Lowry was the owner of said real estate, which was vacant, and up to the spring of 1880 was worth not to exceed \$100 to \$150, when said Lowry built a house thereon, and moved upon said premises and occupied the same as a homestead; that on the 11th day of January, 1878, the defendants recovered a judgment against G. W. Lowry in the county court of Fillmore county, for the sum of \$283.30 and costs, and on the same day filed a transcript of said judgment in the office of the clerk of the district court of said county; that in February, 1885, the defendants caused an execution to be issued on said judgment and levied upon said real estate; that a sale of said property under said execution would cast a cloud upon the plaintiff's title; that no judgment in favor of the defendants was ever indexed in any manner whatever, and the plaintiff had no knowledge of such judgment being entered in the records of said court; that by reason of the failure to index said judgment it was not, and is not, a lien on said real estate. There are other allegations to which it is unnecessary to refer.

The defendants filed an answer to which we need not call attention.

On the trial of the cause the court below found the issues in favor of the defendants to the extent of \$800, and that they have a lien on said real estate for that amount. The plaintiff appeals.

The principal ground on which the plaintiff claims relief is, the failure of the clerk to enter the judgment on the general index. The judgment was indexed, however, in the judgment docket, as follows:

Hamilton v. Whitney, Clark &amp; Co.

## JUDGMENT DOCKET DISTRICT COURT, FILLMORE COUNTY, NEBRASKA.

Judgment Debtor	Judgment Creditor	Date of Judgment			Amt.	Costs	Date of Filing Transcript			Date of Execution			Order of Sale	Remarks
		Month	Day	Year			Month	Day	Year	Month	Day	Year		
G. W. Lowry.....	Whitney, Clark & Co	Jan.	11	1878	283.50	2.80	Jan.	11	1878	Jan.	2	1883		Returned. No property found
						xx 8.25	County Court, Fillmore Co., Neb.			Feb.	14	1885	1 190	

Sec. 321 of the code requires the clerk of the district court to keep at least eight books, viz., the appearance docket, the trial docket, the journal, the complete record, the execution docket, the fee book, the general index, and the judgment record.

Sec. 322 requires "the clerk to enter on the general index the names of the parties to each suit both direct and inverse, with the page and book where all proceedings in such action may be found. The judgment record shall contain the judgment debtor and judgment creditor arranged alphabetically, the date of the judgment, the amount of the same, and the amount of costs, with the page and book where the same may be found. Transcripts of judgments from justices of the peace or courts of probate filed in the district court shall be entered upon such judgment record."

In *Metz v. State Bank*, 7 Neb., 165, neither the general index nor the judgment record contained the name of Hall, the judgment debtor, consequently Metz who had searched the records failed to find the transcript of the judgment in favor of the bank against Hall, and purchased and paid for the real estate of the debtor. In that case it was held that the index was made a part of the record, and that a purchaser was not required to search for judgment liens further than to examine the proper index; and we adhere to that decision. The object of the index is to make the contents of the records readily accessible. Why should the legislature require one to be made unless it was intended to be correct, and to show all actions or judgments in said court against the owners of real estate. *Buchan v. Sumner*, 2 Barb. Ch., 165. *Barney v. McCarty*, 15 Iowa, 510. In this case, however, the judgment record did have the names of the judgment debtor and judgment creditor correctly indexed, and the plaintiff was chargeable with the notice thus, constructively at least, given to him.

It was plainly intimated in *Metz v. Bank*, *supra*, that if either the general or judgment index had apprised Metz of

the existence of the judgment he would have been chargeable with notice, and that rule will be applied in this case. But there is testimony tending to show that the plaintiff had actual notice of the existence of the liens. It appears that he was county judge when the judgment was rendered, and personally prepared and filed the transcript in the district court, therefore upon any view of the case he is chargeable with notice.

2d. Objection is made by the appellees to the limitation in the decree to \$300, it being claimed that more than \$400 is due on the judgment, but the defendants did not appeal and are not now in this court complaining. They are not entitled to any greater relief, therefore, than was awarded to them by the court below. An attempt was made by the plaintiff to claim that the premises were the homestead of Lowry and therefore exempt from forced sale, but the proof fails to sustain the claim. It is apparent that there is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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THE STATE OF NEBRASKA V. PETER J. LAWRENCE.

1. **INCEST: INDICTMENT.** An indictment for incest contains two counts. The first charging the crime to have been committed on the first day of April, 1884. The second on the first day of April, 1882, and on divers other days and times *between* that date and the first day of April, 1884. On motion of the defense the district court required the district attorney to elect upon which count he would proceed to trial. *Held*, No error, being two distinct offenses.
2. ———: ———: **EVIDENCE.** In an indictment against a father for incest with his daughter, under section 204 of the criminal

code, it is not necessary in order to a conviction that the testimony should show that the father and daughter cohabited together as husband and wife, nor that it should appear that he held her out and treated her to others as his wife, nor that he was not living and cohabiting with his wife. If it is shown that the father and daughter lived together in the same family and house, and that he for any considerable length of time, and as a custom, rudely and licentiously had sexual intercourse with her in her room in the house, for that purpose asserting his authority as her parent, it will be sufficient to sustain a conviction.

BILL OF EXCEPTIONS from Platte county, POST, J., presiding, filed by district attorney under the provisions of section 515, criminal code.

*William Marshall, District Attorney, for the state.*

*McAllister Brothers and McFarland & Cowdry, contra.*

REESE, J.

The defendant was indicted under section 204 of the criminal code for the crime of incest. The indictment contained two counts. The first count charged the crime to have been committed on the first day of April, 1884. The second alleges the date of cohabitation to be on the 1st day of April, 1882, and on divers other days and times between that day and the first day of April, 1884.

On the trial the court, on motion of the defendant, required the prosecutor to elect as to which count of the indictment he would proceed upon. This ruling was excepted to and is assigned as error by the district attorney.

At the close of the evidence on the part of the prosecution a motion was made by the defendant to dismiss the case for the reason that the evidence did not sustain the charge as made in the indictment. This motion was sustained by the court and the cause dismissed without a verdict. To this the district attorney also excepted, and now



brings the case into this court on error under the provisions of section 515 *et seq.* of the criminal code.

We think it is quite true as claimed by plaintiff in error that the first count in the indictment contains sufficient to charge a crime under the section above alluded to, for, as said in Desty's Am. Crim. Law, sec. 88b, "if the parties for a single day live together in adulterous intercourse, intending its continuance, the offense is complete." It is equally true that the second count charges a crime, for the offense is a continuing one and may be laid with a *continuendo*. *State v. Way*, 5 Neb., 283.

The objection to this indictment is, that the date fixed by the first count, to-wit, the first day of April, 1884, is not included in the time stated in the second count, to-wit, on the first day of April, 1882, and on divers other days and times *between* that date and the first day of April, 1884; thus excluding the last date. It cannot, therefore, be said that these two counts charge the same offense, but in different forms to meet the evidence, which is permissible in criminal practice (1 Bishop on Criminal Procedure, § 420), but the dates being different, and the first count not being included in the second, as to time, it may be said that each count charges separate and distinct felonies which should not be joined in the same indictment, and for that reason we cannot say the court erred in compelling the election. Especially is this true since it is a matter largely within the discretion of the trial court. *Id.*, § 454, and cases cited in note. *Bailey v. The State*, 4 O. S., 440, Moore's (Ills.) Crim. Law, § 800, and cases there cited.

The remaining question is one of much more importance and in which, to the mind of the writer, there is much difficulty. It is a fundamental rule for the construction of statutes that the several parts of the law should be so construed as to give effect to the legislative intent, and to give some force and effect to every section and part of the law. With this rule before us we must adopt the views of plain-

tiff in error as to the construction of the section of the criminal law referred to, or ignore it entirely as an unmeaning section. We quote sections 202, 203, and 204 of the criminal code:

"Sec. 202. Marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, aunts and nephews, are declared to be incestuous and absolutely void. This section shall extend to illegitimate as well as legitimate children and relations.

"Sec. 203. Persons within the degrees of consanguinity within which marriages are declared by the preceding section to be incestuous and void, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall be liable to indictment, and upon conviction be punished by imprisonment in the penitentiary not exceeding ten years.

"Sec. 204. If a father shall rudely and licentiously cohabit with his own daughter, the father shall, on conviction, be punished by confinement in the penitentiary for a term not exceeding twenty years."

The evidence introduced on the trial, together with the motion of defendant to dismiss the case and the ruling of the court, are thus stated in the abstract:

"The prosecution gave in evidence the testimony of Cornelia Davis as follows:

"'On the 31st of March, 1885, my name was Cornelia Davis. I was a married lady at that time. My name before marriage was Cornelia Lawrence. My age is 19 years. I am acquainted with Peter J. Lawrence, the defendant. He is my father. I have lived in this state four years, with my father most of the time, as his daughter and member of the family. He always claimed me for his daughter.'

"Here at this stage of the case the defendant asks that the prosecution elect upon which of the two counts in the indictment he will prosecute. The motion was sustained by the court, and the district attorney excepts.

"Between the 1st day of April, 1882, and the 1st day of April, 1884, I was living in this state at my father's house. My father was living there at the same time, together in one family, in Platte county, and state of Nebraska. My father was a married man, living with his wife, and she with him, and I was his daughter living there at home, as daughters live with their parents. My father and mother occupied one room and I another room. Between April 1st, 1882, and April 1st, 1884, my father did something improper to me—the same as to his wife. During that period my father had sexual intercourse with me—sometimes two or three times a week and sometimes not for a month or two, and this continued in that way throughout this period between the first day of April, 1882, and the first day of April, 1884, at his own house in Platte county, Nebraska. This sexual intercourse took place sometimes one time of day and sometimes another, sometimes on the bed and sometimes on the floor. The way this sexual intercourse came about he told me I should do it, and he should do as he had a mind to do with me. He said I was his child and the law gave him the right to do as he pleased with me. He said it was nobody's business but his own. He said other men did the same, but their girls didn't tell of it and that I shouldn't. He would swear at me and said I shouldn't tell of it."

**"CROSS-EXAMINATION.**

"I don't think there was any time between the 1st day of April, 1882 and 1884, in which my father and mother were not living and cohabiting together in the same house. I was simply living at home because that was my home and with my father and step-mother. I had a room to sleep

in. I worked around the house the same as I always did. My room was just across the hall from my father's and mother's room. My step-mother was there most of the while. My father held her out to the community as his wife and treated her as his wife. They slept together in the same bed.'

"The district attorney announces that the further evidence in this case will be cumulative. The state and defendant both rest.

"The defendant moves to dismiss the case for the reason that the facts in evidence do not sustain the offense charged in the indictment.

"The motion is sustained and the district attorney excepts.

"And thereupon the court rendered the following judgment: 'And the trial proceeded, and the jury having heard the evidence on the part of the prosecution, the defendant thereupon moves the court to dismiss this case on the ground that the facts given in evidence by the prosecution do not sustain the offense charged in the indictment, and the court being fully advised in the premises doth on consideration thereof sustain the same, to which ruling of the court the district attorney excepts and gives notice that he will file in the supreme court a bill of exceptions in this case, and thereupon it is ordered that this case be and the same is hereby dismissed.'"

By the foregoing it will be seen that while the witness and daughter resided with the defendant it was not in any other capacity, so far as outward manifestations and representations were concerned, than as a member of his family, and not as his wife, he having a wife residing with him at that time.

The contention of the defendant is, that the meaning of the word "cohabit," in section 204, is that of living together as husband and wife, and to this view the district court gave its adherence in deciding the motion to dis-

miss. A number of cases are cited, and such cases are numerous wherein it is so held by very respectable courts under the facts and circumstances before them. And indeed we think that the great majority of courts and text writers have so held; and we think when the word is used in its strict, legal sense that is its proper definition, and such has been the holding of this court. *The State v. Way*, 5 Neb., 283. In support of this general definition the following cases may be cited: *Calef v. Calef*, 54 Me., 365. *Galor v. McHenry*, 15 Ind., 383. *Sullivan v. The State*, 32 Ark., 190. *Miner v. The People*, 58 Ills., 60.

But it is insisted by plaintiff in error that this meaning cannot be applied to the word in the sense in which it is used in section 204, as by the use of this meaning the section is rendered wholly nugatory, as section 203 includes all that would be included in both sections. It is further insisted that every definition given by the cases above cited are applicable to section 203, and therefore give no light in the construction of 204.

It must first be observed that in the definition of the word as furnished by the decisions cited and as used in section 203, the act of cohabitation or "living together as husband and wife" involves the act of both parties to the incestuous intercourse. If they "lewdly and lasciviously cohabit with each other," is the language of the section. The cohabitation must be lewd and lascivious upon the part of both. The term lewd as used in the section above referred to is defined by Webster as "given to the unlawful indulgence of lust, dissolute, lustful, filthy, proceeding from unlawful lust as lewd actions." Lewdly, "with the unlawful indulgence of lust; lustfully." Lascivious is defined by the same author as, "loose; wanton, lewd, lustful, as lascivious desires; lascivious eyes; tending to produce voluptuous or lewd emotions." Lasciviously, "in a lascivious manner, loosely, wantonly, lewdly."

The provisions of section 204 are limited to the acts of

but one—the father. It is provided that if he shall “rudely and licentiously cohabit with his own daughter” he shall be punished in the manner pointed out in the section. The word “rudely” is also defined, as applicable to this section, as “in a rude manner, coarsely, \* \* uncivilly, violently.” Licentiously, “in a licentious manner, freely, loosely, dissolutely.”

From a comparison of the qualifying words used in these sections but little light can be obtained, and but little distinction can be drawn except as to the word “rudely,” which occurs in section 204, the definition of which in the sense used must be, coarsely, uncivilly, violently.

The word “cohabit” is given two definitions, both of which we will notice. 1st, “To dwell with, to inhabit, or reside in company, or in the same place or country.” 2d, “To dwell or live together as man and wife.” It is from the Latin word *cohabitare*, *co*, for *con* (with,) and *habitare*, to dwell. In Zells’ Encyclopedia and Dictionary it is defined as, “to dwell or live together; to dwell with or live live together; to inhabit and abide in company in the same place. 2d, To live together as husband and wife, though not legally married.”

As we have seen, the second or last definition given to this word by the authors above quoted is the sense in which it is generally used when the strict legal meaning is applied. As in Bouvier’s Law Dictionary it is defined thus: “To live in the same house, claiming to be married.” But he adds, “the word does not include in its signification necessarily the occupying the same bed. 1 Hagg. Cons., 144; 4 Paige, ch. 425; though the word is popularly, and sometimes in statutes, used in the latter sense. 20 Mo., 210; Bish. Marr. and Div., § 506n. To live together in the same house. Used with reference to the relation of the parties to each other as husband and wife or otherwise. Used of sisters or other members of the same family, or of persons not of the same family occupying the same house. 2 Vern., ch. 323; Bish.

Marr. and Div., 506n." But, as before stated, if we apply the strict legal meaning to the word in both sections, it must be apparent that section 204 was enacted to no purpose whatever, as it must be conceded that the same crime, so far as the father is concerned, would be described in each section, and the lighter punishment (that provided in section 203) would have to be applied. To the mind of the writer it is quite clear that the legislature intended to reach two classes or kinds of cases. By section 203, where the parties were equally guilty, where they cohabited with *each other* in the sense and under the circumstances hereinbefore stated. By the succeeding section, where the father and daughter lived together in the same house and family, and where the father rudely (coarsely, uncivilly, violently) and licentiously (loosely, dissolutely) cohabits with the daughter. Or in other words where the cohabitation or dwelling on the part of the father is characterized by the condition suggested by the qualifying words. Or where by the exercise of the parental authority with which he is clothed by law and social life he compels her to submit to his amorous embraces, and thus prostitutes her life to the satisfaction of his beastly desires. Within the meaning of this section, if the father of two daughters, if his wife be dead or they be separated, should live—dwell—with them in the same house, and should compel both to cohabit with him in the sense of submitting to his passions, although he could not hold them out to the world as wives, there being two, yet would he be any the less guilty by the fact of there being two? Most certainly not.

If the section under consideration was not intended to apply to cases like the one at bar, we are driven not only to the conclusion that the law-maker had no purpose in view in enacting it, but that there is no law providing a punishment for such cases.

In *Delany v. The People*, 10 Mich., 241, under a statute which made it a crime for "any man and woman, not

being married to each other," to "lewdly and lasciviously associate and cohabit together," it was held that the offense was a joint one, of which both parties must be guilty or neither, and that both must be joined as defendants, and that an information charging the man alone could not be sustained. The same was held in a case of incest in Indiana. *Baumer v. The State*, 49 Ind., 544. See also *The State v. Byron*, 20 Mo., 210. The application of this rule to this case if prosecuted under section 203 would render a conviction impossible.

We have been unable to find a similar statute in any state, save in Illinois, which is identical with section 204, and and from which 204 has been copied. It has existed in that state for more than forty years, but has not received a construction by the supreme court of that state with reference to the question presented here. By giving it the construction here given effect will be given to it, and we think such construction should be given—can conceive of no reason why it should not be, and therefore hold that the district court should have submitted the case to the jury upon the testimony.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	316
21	657
24	591
19	316
25	460
19	316
30	854
30	859
19	316
46	625
19	316
48	877
19	316
52	217
52	531
53	759

#### THE STATE OF NEBRASKA V. NELSON D. HURDS.

1. **Sale of Mortgaged Chattels: INDICTMENT.** Section nine of chapter twelve of the Compiled Statutes provides: "That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of said personal property, or any part thereof, so mortgaged, to any persons or body corporate, without first procuring the consent of the mortgagee of the property to such



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State v. Hurda.

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sale, transfer, or disposal, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars." *Held*, That under the statute it is not necessary that the indictment should allege that the act was done with the intent to defraud.

2. **Constitutional Law.** When the title to an act contains but one subject which is the principal or leading part of the act, and another subject is included in the act but not mentioned in the title, the title and subject matter therein contained which is included in the act will be sustained, while that part of the act not mentioned in the title will be held invalid, if it is apparent that the second was not an inducement to the legislature to pass the first, so that for the second part it would not have passed the act.

**BILL OF EXCEPTIONS** from Dodge county, Post, J., presiding; filed by the district attorney under the provisions of sec. 515, criminal code.

*William Marshall, District Attorney, for the state.*

*F. Dolezal, contra.*

REESE, J.

This is a proceeding in error by the district attorney of the fourth judicial district under the provisions of section 514 *et seq.*, of the criminal code, for the purpose of having the law of the case determined by this court.

The defendant was indicted for selling mortgaged personal property, The charging part of the indictment, after reciting the execution of the mortgage, is, that the defendant, "during the existence of the lien created by said mortgage, did unlawfully, fraudulently and feloniously, and without the consent of the said Seymour, Sabin & Co., the mortgagee, sell and transfer the said described personal property, to-wit, said gray horse, to George C. Land for the sum of \$130.00." To this indictment the defendant demurred, his demurrer was sustained and the case dismissed.

The question presented by this record is, does this indictment charge the commission of a crime, there being no allegation that the sale of the mortgaged property was made with an intent to defraud.

Section nine of chapter twelve of the Compiled Statutes, under which this indictment was drawn, is as follows: "That any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any person or body corporate, without first procuring the consent of the mortgagee of the property to such sale, transfer, or disposal \* \* \* shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years and be fined in a sum not exceeding one thousand dollars."

It will be seen that the statute above quoted contains all the elements of the crime or act for the punishment of which it is sought to provide. The offense is purely statutory, having no relation to the common law. Like many other statutory crimes the criminality is made to consist in the acts themselves which are declared criminal, and not in the intent with which the criminal act is performed. It is quite probable, and we think the law is in this as in other cases, that the act must be accompanied by a criminal purpose or intent in order to render an accused liable to be punished for an infraction of the statute, but that is not the question here. The inquiry is, should this specific intent be alleged? It has been held in some cases and is, perhaps, the rule, that while the intent with which an act made criminal by statute is not directly mentioned in the act, as a necessary ingredient of the crime, yet by a fair construction of the language it is apparent that the intent or purpose was in its spirit, and a necessary part of it, such intent must be alleged. Such a case is *Gabe v.*

*The State*, 1 Eng., 519 (Ark.) The statute made it criminal for any person to "fraudulently keep in possession or conceal any fictitious instrument, purporting to be a bank bill," etc. It was held that the essence of the offense consisted in keeping the fictitious instrument in possession with the intent to pass it as good, and therefore the intent should be alleged. A moment's study of the act would seem to satisfy the mind that such must be the case. No possible evil could result from the simple possession of such instrument. It would invade the rights of none. Therefore the purpose to use them "fraudulently" should be alleged. So again in *Harrington v. The State*, 54 Miss., 490. The statute made it a crime for "any clerk of any court, or public officer, or any other person," to "wittingly make any false entry, or erase any word, or letter, or change any record belonging to any court or public officer, whether in his keeping or not." The indictment charged that the defendant changed certain figures in a record book belonging to the records of the treasurer's office of Colfax county, being the numbers of certain registered warrants. It was held that the indictment should allege that the change was made for the purpose of injuring or benefiting some one. The spirit of the statute being shown by the provision in the same act, that in addition to the punishment for the crime the falsifier should be liable for all damages in an action brought by the party aggrieved. It was evident from the act itself that it was not the purpose of the legislature to punish a clerk or officer for the correction of a clerical mistake in the records as was the case there. In that case the court says: "Though as a general rule it is sufficient to charge a statutory offense in the words of the statute, yet this rule does not apply where there are in the language of the statute no sufficient words to define any offense." It is apparent that this exception has no application to the case at bar.

In *Commonwealth v. Slack*, 19 Pick., 304, the statute

under which the defendant was indicted made it criminal for any person not authorized by the board of health to knowingly or willfully dig up, remove, or convey away, or to assist in digging up, removing, or conveying away any human body or the remains thereof. The indictment charged the defendant with unlawfully, feloniously, etc., removing and carrying away from the town of Westhampton the dead body of one Ibwok Miller, deceased, the defendant not being authorized by the board of health to do so, etc. The court held that the clear purpose and object of the statute was to protect dead bodies from violation for the purposes of dissection, and that it was necessary that the indictment should allege that purpose or intent on the part of the defendant.

*The People v. Wilber*, 4 Parker's Criminal Reports, 19, is cited by defendant in error as holding that the intent to defraud should be specifically alleged, and such is the holding in that case. The act under which the defendant was indicted was for the protection of gas light companies as expressed in the title. It was enacted "that any person who, with intent to injure or defraud any gas company \* \* \* shall make or cause to be made any pipe, tube, or other instrument, or contrivance, or connect the same, or cause it to be connected, with any main service pipe, or other pipe, for conducting or supplying illuminating gas, in such manner as to connect with and be calculated to supply illuminating gas to any burner \* \* \* by which illuminating gas is consumed," without passing through a meter, etc., should be guilty of a misdemeanor. It will be observed that the "intent to injure or defraud" is made by the statute one of the essential elements of the crime, and is used in the act as one of the criminal acts or conditions which must exist or the act will not be characterized as criminal. In such case the intent to defraud being made by the statute a part of the offense it should, by all rules of criminal pleading, be so alleged. But the

clear distinction between that act and the one under consideration in this case, upon this point, prevents the case cited from becoming authority here. *The State v. Jackson*, 39 Conn., 229, also cited by the defendant in error, is a case where the defendant was prosecuted under the following statute: "Every person who shall hire any horse and shall willfully make any false statement relative to the distance, time, place, or manner of using the same, with intent to defraud, shall be punished," etc. It was held that an indictment which described the offense in the general language of the statute, without alleging what the misrepresentations were, to whom made, etc., was insufficient, the court saying that the case was "analogous to those of misrepresentations which arise under the statute in relation to the obtaining of goods by false pretense." While the offense was created by statute, yet it was so created in general terms, and no words descriptive of the offense were used. The rule there declared has no application to this case.

As we have seen, the act under consideration contains all the elements which the legislature saw fit to require should exist to constitute the crime. A mortgage must have been made conveying the property. The act which is declared to be criminal must occur during the existence of the lien or title created by the mortgage, then if under these conditions the mortgagor sells or transfers the property without the consent of the mortgagee (with the criminal mind), the crime is complete. The act must be accompanied by an intent to do wrong (1 Bishop Crim. Law, § 287), but it is not necessary to allege this intent.

In sec. 611, vol. 1, Bishop's Criminal Procedure, in discussing the subject of indictments under statutes defining the offense, it is said: "To statutes of this sort the doctrines which require the indictment to set out the name of the defendant, the place, the time, the identifying particulars, and all other like things, apply precisely as to the common

law. Where a statute defines the offense which it creates it is ordinarily adequate, while nothing less will in any instance suffice to charge the defendant with all the acts within the statutory definition, substantially in the words of the statute, without further expansion." The same author, at section 521, quoting from Starkie on Criminal Pleading, says: "To render a party criminally responsible a vicious will must concur with a wrongful act. But though it be universally true that a man cannot become a criminal unless his mind be at fault it is not so general a rule that the guilty intention must be averred upon the face of the indictment." The author then adds, "for in a large part of the crimes the vicious will appears *prima facie* in the act itself, hence to allege simply the act makes the required *prima facie* case, and any non-concurrence of the will therein is matter of defense. But where an intent other than what arises out of the act as alleged is an element in the crime, as where a particular intent is descriptive of it, this must appear in the indictment."

The well-settled rule seems to be that if the offense consists in doing an unlawful or criminal act the evil intention will be presumed and need not be alleged. The intent is nothing more than the result which the law draws from the act, and requires no proof beyond that which the act itself implies. *Com. v. Hersey*, 2 Allen, 180, and cases there cited. To this point also see *Phillips v. The State*, 17 Georgia, 461. In that case the provisions of the statutes were as follows: "Any person who shall draw or make a bill of exchange, due bill, or promissory note, or indorse or accept the same in a fictitious name, shall be guilty of forgery, and on conviction shall be punished," etc. The court say: "It is clear that under the law the offense is complete, provided it is made satisfactorily to appear, from the evidence, that the note was drawn and delivered in a fictitious name. Under the first section of this same head of the code the general offense of

forgery is defined; and there it is made necessary to allege in the indictment, and consequently to prove on the trial, the intent to defraud. But in the particular species of forgery for which the defendant is prosecuted, as will be seen from the statute, no such requirement is made. The court is bound to presume this omission was intentional. The law makes the *act* the *crime*, and infers a criminal intent from the act itself." See also *McNamee v. The People*, 31 Mich., 473. We therefore hold that the statute in question contains all the elements which the legislature in enacting it intended should constitute the offense, and that an indictment which substantially follows its language is sufficient.

It is insisted that the act of the legislature by which the section under consideration was passed is unconstitutional. This contention is founded upon the clause of the constitution of this state (art. 3, sec. 2), which provides that, "No bill shall contain more than one subject and the same shall be clearly expressed in its title." It is said that the act contains two subjects, and the decision of this court in *Ex parte Thomason*, 16 Neb., 238, is cited to sustain this view. It is true a part of the act was held void as not within the title, but it does not therefore follow that the whole act was void. The question here presented was, we think, settled in *The State v. Lancaster County*, 17 Neb., 85. In that case the present Chief Justice, MAXWELL, in writing the opinion of the court, said: "The rule is well settled that where the title to an act actually indicates and the act itself actually includes two distinct objects where the constitution declares it shall embrace but one, the whole act must be treated as void from the manifest impossibility of choosing between the two and holding the act valid as to one and void as to the other," citing Cooley's Const. Lim., 147. "But this rule," he says, "will apply only in those cases where it is impossible from the inspection of the act itself to determine which act, or rather

Thomas v. Hinkley.

which part of the act is void and which valid. Where this can be done the rule does not apply unless it shall appear that the invalid portion was designed as an inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would not have passed the valid part alone." The portion of the act held invalid was not included in the title, and was held void, but this did not affect the remaining portion. The title referred alone to the fraudulent *transfer*, and not the removal of property. The act as it now stands in section nine in chapter 12 of the Compiled Statutes of 1885, is valid and must be so held.

It follows that the demurrer should have been overruled.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	324
34	600
19	324
45	826
19	324
53	775
55	144

JULIUS E. THOMAS ET AL., PLAINTIFFS IN ERROR, V.  
ELLEN HINKLEY, DEFENDANT IN ERROR.

1. **Liquors: BOND OF SELLER.** A liquor dealer's bond with sureties, was given to the village of Hebron, instead of the state of Nebraska. *Held*, That such bond was not therefore invalid; and that a wife may maintain an action thereon for loss of means of support caused by intoxicating liquors sold to her husband. *Huffman v. Koppelkom*, 8 Neb., 344, followed. *Sexson v. Kelley*, 3 Id., 104, distinguished.
2. ———: ———. The bond is for the use of any person who may be injured by the sale or giving away of intoxicating liquors by the person licensed or his agent, and the obligee is not necessarily nor usually the party interested.
3. ———: ———: **APPROVAL.** Where the bond of a liquor dealer is filed with the clerk and retained by him, and the principal in the bond then engages in the sale of intoxicating liquors, the



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 Thomas v. Hinkley.
 

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sureties cannot plead as a defense to the bond that no formal approval was endorsed on such bond.

4. ———: ———. The recital in a bond signed by the principal and sureties that "a license to sell malt, spirtuous, and vinous liquors as provided by law, was issued to the principal" is sufficient *prima facie* as against them to show the issuing of license.
5. ———: ———: LIABILITY OF SURETY. Where the same surety signs the bonds of two or more dealers he will be liable on each, and the validity of such bonds will not be affected.

ERROR to the district court for Thayer county. Tried below before MORRIS, J.

*O. H. & A. R. Scott*, for plaintiffs in error, cited: *Season v. Kelley*, 8 Neb., 105. *State v. Andrews*, 11 Neb., 523.

*Mason & Whedon* and *Manford Savage*, for defendant in error, cited: *Horn v. Whittier*, 6 N. H., 88. *Governor v. Allen*, 8 Humph., 176. *Thomas v. White*, 12 Mass., 369.

MAXWELL, CH. J.

The defendant in error recovered a judgment against A. Miller for the sum of \$900 and costs, for loss of means of support, caused by the death of her husband from intoxicating liquor furnished by Miller. Being unable to collect the judgment from Miller she brought this action against the plaintiffs in error, who were bondsmen of said Miller, and recovered judgment against them. The bond is as follows:

"BOND ON LICENSE TO SELL LIQUORS.

"STATE OF NEBRASKA, }  
 THAYER COUNTY. } ss

"Know all men by these presents:

"That Amos Miller, as principal, and Julius E. Thomas and Louis Harp, and George M. Church, D. J. Nebergall,

Wm. H. Stewart, and Alfred Norbøe, as sureties, are held and firmly bound unto the village of Hebron, state of Nebraska, in the penal sum of five thousand dollars, good and lawful money of the United States, for which payment well and truly to be made, we bind ourselves, our heirs and assigns, jointly and severally by these presents. The conditions of the above obligations are such, that whereas the board of trustees of the village of Hebron, in Thayer county, Nebraska, have granted unto the above bounden Amos Miller a license to sell malt, spirituous, and vinous liquors, as provided by law. Said liquors to be sold in the building situated on lot six, block ten, of the town of Hebron, in said county, and said license to continue in force from the 20th day of October, A.D. 1881, until the 20th day of April, 1882 (or during the pleasure of said board).

"Now if the above bounden Amos Miller shall not, during the continuance of said permit, violate any of the provisions of an act to regulate the license and sale of malt, spirituous, and vinous liquors, etc., etc., passed by the legislature of the state of Nebraska, and duly approved by the governor thereof, and to take effect June 1st, 1881, and all acts and parts of act supplemental thereto, and shall pay all damages, fines, and forfeitures, which may be adjudged against him under the provisions of the statutes of the state of Nebraska, then in such case the above obligations to be void, otherwise to remain in full force and effect.

"Signed and sealed this tenth day of October, A. D. 1881.

"AMOS MILLER, [L. S.]

"JULIUS E. THOMAS, [L. S.]

"D. J. NEBERGALL, [L. S.]

"LOUIS HARP, [L. S.]

"GEORGE M. CHURCH, [L. S.]

"ALFRED NORBØE,

"WM. H. STEWART,

"Signed, sealed and delivered in presence of E. S. Knight.

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 Thomas v. Hinkley.
 

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"STATE OF NEBRASKA, }  
 THAYER COUNTY. } ss.

"Alfred Norbœ, representing \$100, Julius E. Thomas, representing \$500, Louis Harp, representing (personal property) \$1,200, George M. Church, representing \$1,000, D. J. Nebergall, representing \$1,000, Wm. H. Stewart, representing \$1,200, being first duly sworn, depose and say (each for himself), that he is a resident householder and freeholder of the county of Thayer, in said state, that he is surety in the foregoing bond, that he is worth in real estate therein the sum set opposite his name above, and that said sum is beyond the amount of his debts, and that he has property liable to execution in the state of Nebraska, equal to the amount so mentioned.

"A. NORBŒ

"E. THOMAS, [L. s.]

"LOUIS HARP, [L. s.]

"GEORGE M. CHURCH, [L. s.]

"D. J. NEBERGALL, [L. s.]

"WM. H. STEWART, [L. s.]

"Subscribed in my presence and sworn to this 10th day of October, A.D. 1881.

[SEAL.]

"E. S. KNIGHT,

"Notary Public."

Indorsed on bond: "Filed in the office of the village clerk of Hebron, Nebraska, October 19th, A.D. 1881."

The principal ground upon which a reversal is sought is because the bond is invalid by reason of the village of Hebron being the obligee instead of the state of Nebraska, as required by the statute, and *Sexson v. Kelley*, 3 Nebraska, 104, is cited to sustain that position.

In *Sexson v. Kelley* the bond was made payable to the city of Lincoln, and contained no provision for the payment of damages which might be adjudged against the licensed parties. The wife of Sexson brought an action

against the obligors in the bond to recover damages which she had sustained by reason of the sale of liquors to her husband. The defendants demurred to the petition on the ground that it did not state a cause of action, and the demurrer was sustained. In the decision of the case it is said the bond was a nullity. The question properly arose upon the condition which did not include *damages*, and therefore as the plaintiff's action was to recover damages the surety could not be bound beyond the terms of his contract, and there could be no liability on the *bond*. This was the particular point urged on the argument and raised by the demurrer. Judge Gantt in writing the opinion discusses the question of the obligee.

The writer entertains great respect for that able and impartial judge to whose learning, research, and industry this state is greatly indebted. But the question was not properly before the court, and the decision on that point can scarcely be considered an authority. How far the obligors in a bond can insist on an objection of this kind after a breach of the conditions of the instrument we need not now determine. The syllabus was not prepared by the court at that time, and the exact points decided could not therefore in all cases be clearly expressed.

In *Huffman v. Koppelkom*, 8 Neb., 344, the official bond of the sheriff was given to the state and not to the county, as required by the statute, but the court held that the irregularity in nowise affected the liability of the sheriff or his sureties in an action thereon for damage occasioned by official misconduct. It is said (page 347): "The obligee in an official bond is not necessarily nor usually the party interested therein in actions upon it. The bond being really for the use and benefit of whomsoever is injured in consequence of the unfaithful performance of the duty of the officer, the obligee is really but a nominal party. And whatever may be the name of this nominal party the action under our practice must be in the name of the real party

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Thomas v. Hinkley.

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in interest, although not named in the bond. This in our view states the law correctly. While the statute requires the bond to be payable to the state of Nebraska, yet it provides that it "may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person licensed or his agent." So that the bond is not for the use of the state, but for persons who may sustain injuries by reason of the sale of intoxicating liquor. The state, therefore, is merely a nominal party—a trustee—but there is no provision that if another obligee is named the bond will therefore be void. In the absence of such a provision we must hold the bond to be valid and available to any person who may have sustained injuries by the sale of liquor by the principal in the bond. *Van Deusen v. Hayward*, 17 Wend., 67. *Ring v. Gibbs*, 26 Wend., 502.

*Second.* Objection is made that the bond was not approved by the board of the village of Hebron. It was filed and retained by the clerk, however, and Mr. Miller, the principal in the bond, engaged in the sale of intoxicating drinks—in other words, availed himself of the benefits of the bond and treated it in all respects as valid and approved. Aside from this the act of retaining the bond and issuing the license was a sufficient approval of it.

*Third.* Objection is made that no license was ever legally issued. It is unnecessary to enter into a discussion of that question, as we find a recital in the bond itself, signed by the plaintiffs in error, stating that "license to sell malt, spirituous, and vinous liquors as provided by law," etc., has been issued to Miller. That recital concludes these parties, unless they can show fraud, accident, or mistake, which is not claimed.

*Fourth.* Objection is made that one of the sureties was also surety on another bond of like character in contravention of the statute; but this does not render the bonds void,

nor can such surety plead the fact as a defense. The statute is in the nature of a direction to boards which approve bonds of that character, but does not declare such bonds affected in any manner by a surety signing two or more bonds. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

PETER MATHEWS, PLAINTIFF IN ERROR, v. THE STATE  
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: EVIDENCE OF PRISONER.** At common law, where the accused was not permitted to testify in his own behalf, the testimony of the prosecutrix might be sufficient to warrant a conviction for rape; but under the statute, where the accused avails himself of the right to testify and clearly and explicitly denies the commission of the offense, there must be testimony corroborating that of the prosecutrix to authorize a conviction. *Oleson v. State*, 11 Neb., 276. *Fisk v. State*, 9 Neb., 62.
2. **Rape: EVIDENCE.** To authorize a conviction for rape the testimony must show that the prosecutrix resisted to the extent of her ability. Evidence examined, and *Held*, Insufficient.
3. **Evidence: OBJECTION.** Where a question is asked a witness to which objection is made, which is sustained, the party desiring the evidence must offer to prove the facts sought to be introduced in evidence.
4. **Criminal Law.** An escape is not necessarily an admission of guilt.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

*J. L. Caldwell*, for plaintiff in error.

19	330
19	462
22	85
19	330
25	123
26	548
19	330
27	93
19	330
28	612
28	874
29	549
19	330
32	8
19	330
33	702
19	330
34	661
34	709
35	255
19	330
36	27
36	416
19	330
46	154
46	394
19	330
48	613
19	330
49	485
19	330
61	673
19	330
62	168

*William Leese, Attorney General, for defendant in error.*

MAXWELL, CH. J.

The plaintiff was convicted of the crime of rape at the May term, 1885, of the district court of Lancaster county, and was sentenced to imprisonment in the penitentiary for three years. He now alleges error in the proceedings. The errors deemed material will be noticed in their order.

First, that the verdict is not sustained by the evidence. The sole testimony upon which the verdict rests is that of the prosecuting witness. She testifies that the offense was committed in March, 1881; that at that time and for some years previously she had resided in a shanty 10 by 12 feet square in North Bluff precinct; that in 1881 her husband had been dead about two years, and that she lived entirely alone; that her nearest neighbors were named Maher, and resided about eighty rods from her residence; that on the morning of the day on which the offense is alleged to have been committed the prisoner and one Taylor came to her residence and shoveled the snow away from around the same and carried in fuel, etc., and then left; that in ten or fifteen minutes after Mathews and Taylor left—"about ten minutes, I should think—not more than ten minutes—I had not made my dinner yet—Mathews returned. \* \* \* He said, 'Come and lay down on the bed.' I said, 'No, sir, I don't do that kind of business, unless I was married to a man.' He said, it would not be long; something like that; he just took my chair and wheeled it around—didn't throw me off; he waited a few minutes to see if I was going; I didn't go, and he wheeled it round the second time; still I didn't go, and he took hold of me and threw me off."

Prosecuting Attorney. Go on and tell how he threw you on the bed.

A. He took me round the waist and threw me on the bed, and then kept me there till he got his satisfaction.

Q. State what he did?

A. Till he had full connection with me.

Q. What did you do while on the bed?

A. I got away from him once; then he got me back the second time—he being strong and I being so weak, wanting something to eat and fright together, I had not much strength—you all know that—you ought to know it; I tried to get away the second time, but could not get away; he kept me till he got his satisfaction.

Q. Had he connection with you?

A. Yes, full connection.

Q. State to the jury what you did in the way of resisting—if you did anything more, tell it?

A. I did not do anything more, but just tried to get away from him all I could.

Q. Did you use your full strength?

A. I used all the strength I had to get away from him, but could not.

This is all the testimony in the record in regard to the force alleged to have been used by the prisoner, or the resistance of the witness. She also testifies that she was 58 years old at that time.

In *Oleson v. State*, 11 Neb., 276, it was held that where it appears that at the time the offense was alleged to have been committed the prosecutrix was conscious, and had possession of her natural mental and physical powers, and was not terrified by threats or in such a position that resistance would be useless, it must appear that she resisted to the extent of her ability. In that case the offense was alleged to have been committed about 10 o'clock at night in the shanty in which the prosecutrix resided, in the city of Lincoln. Several neighbors resided within hearing distance, but she made no outcry. Her clothes were not torn, nor were there any marks of violence on her person to in-



dicating a struggle. The court held that the evidence as to resistance was not sufficient to sustain the charge.

In *People v. Dohring*, 59 N. Y., 382, it is said: "The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking resistance must be dangerous or absolutely useless, or there must be duress or fear of death. *Reg. v. Hallett*, 9 C. and P., 748; 1 Hawk., P. C., chap. 4, § 2." And on page 383 it is said: "But whatever the circumstances may be, there must be the greatest effort of which she is capable therein to foil the pursuer and preserve the sanctity of her person. This is the extent of her ability." And see *The People v. Bransby*, 32 N. Y., 525, 531, 540. *The People v. Hulse*, 3 Hill, 309, 316, 317. *Rex v. Lloyd*, 7 Carr and P., 318. *The People v. Crosswell*, 13 Mich., 427, 433.

In *State v. Burgdorf*, 53 Mo., 65., the offense was alleged to have been committed on a girl 16 years of age. That the prisoner had sexual intercourse with the girl seems to be conceded in the opinion, but there was no resistance nor outcry. It is said (page 67): "The crime under consideration can, in the language of one of the authorities, only be committed where there is on the part of her on whom the attempt is made the utmost reluctance and the utmost resistance. The passive policy or a mere half-way case will not do."

In *People v. Abbot*, 19 Wend., 194-195, it is said: "Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. That there was not an immediate disclosure, that there was no outcry, though aid was at hand, and that known to the prosecutrix, that there are no indications of violence to the person, are put among the circumstances of defense, not as conclusive, but as throwing distrust upon the assumption that there was a real absence of assent. 1 Hale, P. C., 638. A mixed case will not do: the connection

must be absolutely against the will." To the same effect are *The People v. Morrison*, 1 Park. Cr. R., 625. *Woodin v. The People*, 1 Park. Cr. R., 464. *Taylor v. State*, 50 Geo., 79. *People v. Brown*, 47 Cal., 447. *Whitney v. State*, 35 Ind., 506. *People v. Benson*, 6 Cal., 221.

In *Connors v. State*, 47 Wis., 523, it was held error for the trial court not to press upon the attention of the jury the rule that voluntary submission by the woman while she has the power to resist, however reluctantly yielded, deprives the act of an essential element of rape.

In *Whittaker v. State*, 50 Wis., 518, it is said: "Any consent of the woman, however reluctant, is fatal to a conviction. The passive policy will not do. There must be no consent. There must be the utmost reluctance and resistance." *State v. Burgdorf*, 53 Mo., 63. "It must appear that she showed the *utmost reluctance* and used the *utmost resistance*." *Don Moran v. The People*, 25 Mich., 356. See also *People v. Hulse*, 3 Hill, 316. *State v. Murphy*, 6 Ala., 765. *Pleasant v. State*, 8 Engl., 360.

Many other cases to the same effect could be cited. The reason for this rule is apparent, as probably but comparatively few women would admit that they gave their assent to illicit intercourse. If the mere refusal to give express assent was sufficient to establish the crime of rape, a very large proportion of the cases of illicit intercourse no doubt could be brought under that head, and no doubt would be, particularly where the conduct of the parties was exposed and such as to bring them into public odium. The law, therefore, as evidence that the act was committed against her will, requires the prosecutrix to use all the means in her power to prevent the consummation of the act. If the act is committed with force and against her will there is a great probability that some marks will be left upon her person or clothing, or both, as evidence of the struggle, and if she make complaint at the first opportunity these facts tend to corroborate her testimony that the offense was

committed by some one. If no marks are left upon the person or clothing, and no complaint is made at the first opportunity, a doubt is thrown upon the whole charge, and unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, the testimony of the prosecutrix alone is not sufficient to warrant a conviction.

Sir Matthew Hale in *Pleas of the Crown*, vol. 1, page 633 (Ed. of 1778), lays down rules for testing the credibility of the principal witnesses, which are as applicable to-day in trials of this character as when announced. He says (page 635): "It is true that rape is a most detestable crime and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent." He then mentions several unfounded and malicious prosecutions for rape, among them a case tried before himself, where the prosecutrix swore positively to the commission of the offense, and it turned out upon inspection to have been physically impossible for the accused to have committed the offense. He adds, "I only mention these instances that we may be more cautious upon trials of offenses of this nature wherein the court and jury may with so much ease be imposed upon, without great care and vigilance, the heinousness of the offense many times transporting the judge and jury with so much indignation that they are overhastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses."

In the case at bar the testimony fails to show such resistance on the part of the prosecutrix as would constitute the offense. All that she testifies to may be true, and still the act not have been against her will. The proof, therefore, fails to establish the charge.

2d. There is no corroborating evidence whatever. In *Garrison v. The People*, 6 Neb., 283, an instruction had been given in the court below that if the jury were satisfied beyond a reasonable doubt, from the testimony of the prosecutrix alone, of the guilt of the accused they would be justified in returning a verdict of guilty. There was no bill of exceptions in that case, and the case came before the court upon errors in the record and instructions. The presumption being that the instruction was applicable to the testimony, it was held not erroneous. It was not held nor intended to be that the bald assertion of a prosecutrix, whose testimony was contradicted by other witnesses, would be sufficient where there were no marks upon her person or clothing showing a recent struggle, or no complaint as soon after the occurrence as an opportunity offered. Hence, in *Fisk v. State*, 9 Neb., 62, where no complaint was made until about six months after the commission of the alleged offense, and the accused was convicted on the naked assertions of the prosecutrix, which he had denied in his testimony, the verdict was set aside and the charge was afterwards discovered to be entirely unfounded, and the case was dismissed by the court below.

In *Oleson v. State*, 11 Neb., 276, there was no testimony tending to corroborate the statements of the prosecutrix that the defendant resorted to force, and the fact that she made no outcry or resistance such as the law requires, rendered the proof insufficient to establish the charge.

In *Murphy v. State*, 15 Neb., 383, the accused testified in his own behalf and admitted the sexual intercourse with the prosecutrix at the time and place and under the circumstances described by her, thus corroborating her on several of the material points in the case and leaving only the question of force and resistance for determination. The testimony of the prosecutrix was strengthened by the fact that she had been married but four weeks, and was then living with her husband, the improbability that she would

voluntarily permit a colored man to have sexual intercourse with her, and by the fact that immediately on returning to her friends she informed them of the offense.

At common law the accused was not permitted to testify in his own behalf. However false or malicious the charge might be his lips were sealed, and if the prosecutrix testified positively to the facts constituting the offense, and there was no evidence to the contrary, the courts held the evidence sufficient.

Sir Matthew Hale, however, 1 P. C., 633; contended that corroborating proof was necessary. Under our statute the accused is permitted to testify in his own behalf, and in that regard the statute has changed the common law rule so that where his testimony expressly denies that of the prosecutrix she must be corroborated to authorize a conviction. For this purpose the prosecution may show that the prosecutrix made immediate complaint, and any marks upon her person or clothing which would indicate a struggle may be given in evidence for the purpose of showing the attack upon her. Her statement cannot be used as evidence-in-chief, but may be enquired into on cross-examination. *Oleson v. State*, 11 Neb., 276. 3 Greenleaf Ev., § 213.

The law presumes that a woman who has suffered the indignity and brutality of a rape will not submit in silence to the wrong, but will at once take the necessary steps to bring the offender to justice. This was one of the tests of the common law. Blackstone says: "The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony and how far she is to be believed must be left to the jury upon the circumstances of fact that concur in that testimony, for instance, if the witness be of good fame; if she presently discovered the offense and made search for the offender; if the party accused fled for it. These and the like are concurring circumstances which give greater probability to her evi-

dence." 4 Blacks. Com., 213. As there was no attempt made to corroborate the testimony of the prosecutrix in this case her evidence alone could not have been sufficient.

3d. A number of questions were asked the prosecuting witness, intended apparently to challenge her character for chastity. These were excluded. The proper course in such case is, upon the exclusion of the question to offer to prove certain facts. In other words, the evidence which the party proposes to offer must be presented to the court, as well as the questions to which objection is made; the court will then be able to determine whether or not the evidence is pertinent. We are unable, therefore, to determine whether or not the court erred in its rulings on that matter.

4th. The testimony tends to show that the prisoner's home is in the state of New York; that he was arrested in that state in 1881 and escaped from the officer on his way here. The proof upon this point is not very clear, nor is it necessary to consider it. An escape or attempt to escape has been held as ground to infer consciousness of guilt; but the weight of this consideration is frequently greatly modified by special circumstances. 1 Bish. Cr. Pro., § 1250. History shows that escapes and attempts to escape are not confined to the guilty alone, and that but little reliance can be placed on them as evidence. The prisoner at that time was a mere youth, and certainly cannot be convicted on the ground alone of an attempt to escape. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

HICKS & MILLER TEA CO., APPELLANT, v. JAMES E.  
MACK ET AL., APPELLEES.

**Homestead: LIABILITY FOR DEBTS.** Where a homestead of greater value than \$2,000 is transferred from a husband to his wife without consideration, and still occupied as a homestead, the surplus in value over \$2,000 will be liable in the hands of the wife for debts of the husband contracted before the transfer, in the same manner as though the title had remained in the husband.

APPEAL from the district court of Fillmore county.  
Heard below before MORRIS, J.

*Billings & Donisthorpe*, for appellant, cited: *Ashton v. Ingle*, 20 Kan., 670. *Mayfield v. Maasden*, 59 Iowa, 517. *Smith v. Miller*, 31 Ill., 157. *Haworth v. Travis*, 67 Ill., 301. *Dearing v. Thomas*, 25 Ga., 223. *Smith v. Sands*, 23 N. W. R., 357.

*G. D. Mathewson*, for appellees, cited: *Thompson Homesteads*, § 407. *Kelley v. Baker*, 10 Minn., 124. *Stout v. Rapp*, 17 Neb., 471.

MAXWELL, CH. J.

This is a creditor's bill, filed by the plaintiffs against the defendants, to subject certain real estate to the payment of their judgments. A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiffs appeal.

It is alleged in the petition in substance that James E. Mack, in the year 1881, and ever since, has been engaged among other things in retailing cigars at Geneva, in Fillmore county, in this state, and has at various times purchased from the plaintiffs large quantities of goods; that

he has asked for and obtained credit upon the faith that he was the owner of the west 28 feet of lot 87 in the town of Geneva, with all the buildings and appurtenances thereunto belonging; that in the month of January or February, 1885, said Mack purchased a bill of goods of the plaintiffs amounting to \$143.75, upon the faith that he was still the owner of said property; that in August, 1885, the plaintiffs recovered a judgment on said debt in the county court of Fillmore county, a transcript of which was duly filed in the office of the clerk of the district court of that county, and an execution issued thereon against the goods and chattels, lands and tenements of said Mack, which execution was thereafter and before the commencement of this action duly returned by the sheriff of said county, endorsed "no property found." That during the summer of 1884, and for a long time prior thereto, said Mack had purchased goods, wares, and merchandise of Chinn & New, of Omaha; that on or about the 1st day of September, 1884, there was due said firm from said Mack the sum of \$85.00, which was afterwards secured to be paid by a promissory note, and on the 9th day of March, 1885, said plaintiffs recovered a judgment thereon for the sum of \$90.75 and costs, a transcript of which judgment was, on the 10th day of March, 1885, duly filed in the office of the clerk of the district court of Fillmore county, and an execution duly issued thereon, which was returned "wholly unpaid and unsatisfied;" that such judgment is still unpaid, and on or about the 24th of August, 1885, was assigned to the plaintiffs; that on the 9th day of September, 1884, Mack and wife conveyed said real estate to George D. Mathewson, who thereupon on the same day reconveyed said real estate to the wife of said Mack, and she now holds the legal title to said property; that at the date of said conveyance said Mack was insolvent, and there was no consideration for said deed whatever; that in



September, 1884, said Mack gave a chattel mortgage on his personal property, etc., for the purpose of preventing the application of such property to the payment of his debts, etc., and that said Mack has no other property than that mentioned out of which said debts can be paid. It is also alleged that the real estate is of the value of \$3,000. There are other allegations in the petition to which it is unnecessary to refer.

The question presented is, does the petition, under the liberal rules of construction required by the code, state a cause of action? We think it does as to all debts contracted before the transfer of the property or with a view to such transfer.

Sec. 17, chap. 32, Comp. Stat., provides that "every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like interest as against the person so hindered, delayed, or defrauded, shall be void."

As to all rights of the plaintiffs or their assignors existing when this transfer was made, the surplus over \$2,000 will be subject to the plaintiffs' demands. The statute points out the procedure where the homestead is of greater value than \$2,000, and it need not be referred to here. A court of equity has full power in cases of this kind to set aside the transfer from Mack to his wife, so far as it may be necessary to subject said property in excess of \$2000 to the payment of the plaintiffs' claim existing when the transfer was made—in other words, to adapt the relief to the facts proved. This can only be done after a full hear-

ing of the testimony. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19 342  
35 78

19 342  
40 684

19 342  
42 360

19 342  
47 240

**BENJAMIN SPIELMAN, PLAINTIFF IN ERROR, V. THOMAS FLYNN, DEFENDANT IN ERROR.**

1. **Justice of the Peace: JURISDICTION.** Where the amount claimed does not exceed \$200, and where an action is brought against a sheriff for the value of property sold by him under an execution in his hands, and there is no charge of misconduct, a justice of the peace has jurisdiction.
2. **Trial: EVIDENCE: STENOGRAPHER'S RECORD.** A certified copy of the stenographic reporter's record of proceedings in the district court is admissible in all cases where the original would be; and where the parties stipulate that the evidence of a witness on a former trial may be used instead of taking his deposition the stipulation should be enforced.
3. ———: ———: **STATUTORY CONSTRUCTION.** Sec. 394 of the code for the inspection of books, papers, or documents in the hands of the adverse party, does not apply to *copies* of a public record open to the inspection of both parties; and a copy of which may be obtained by either or both parties upon payment of the necessary fees.
4. **Continuance.** Where material testimony is suppressed, without which the party in whose favor it was taken cannot safely proceed to trial, the court, upon the application of such party and upon such terms as may be just, should grant a continuance.

ERROR to the district court for Platte county. Heard below before TIFFANY, J., sitting for POST, J.

*McAllister Brothers*, for plaintiff in error.

*M. Whitmoyer* and *J. J. Sullivan*, for defendant in error.

MAXWELL, CH. J.

This action was brought before a justice of the peace of Platte county by Thomas Flynn against Benjamin Spielman, David Anderson, Joseph Schmitz, Peter Zibach, Geo. Berney, W. D. Davis, Henry Ahrens, Gerhart Loseke, and Charles Medaedel to recover the value of fourteen calves, which it is alleged Spielman, as sheriff of Platte county, levied upon and sold. The cause was removed under the statute to the county court of Platte county, the names of the sureties being stricken from the bill of particulars. A trial was had in the county court from which an appeal was taken to the district court.

The petition filed in the district court is as follows:

“Plaintiff complains of defendant, and alleges that said defendant, on the 14th day of December, 1881, unlawfully and forcibly took from the premises of plaintiff and forcibly and unlawfully carried away fourteen (14) yearling calves of the value of fifteen dollars (\$15) each, the property of plaintiff, and still unlawfully detains the same—to the damage of the plaintiff in the sum of one hundred and ninety dollars (\$190), for which sum plaintiff prays judgment with interest,” etc.

Spielman in his answer states in substance that at the time indicated he was sheriff of Platte county; that at the September term of the district court of said county one Peter Klinchi recovered a judgment against one Michael O'Hearn for the sum of \$900, and costs; that on the 23d day of December, 1881, said judgment being in full force and effect the clerk of said court issued an execution thereon directed to said Spielman as sheriff; that on said day said Flynn “pretended to purchase said calves from said Michael O'Hearn, and did take possession of said calves and remove them from the custody and possession of said Michael O'Hearn, under and by virtue of a fraudulent and corrupt

conspiracy with said Michael O'Hearn to hinder, delay, and defeat the collection of said execution," and that "acting as such sheriff he levied upon and sold said calves."

Flynn in his reply admits that Spielman was sheriff and was acting under an execution as alleged, "admits that one Peter Klinchi recovered a judgment against O'Hearn, and that at said time said judgment *was not satisfied*," "admits that at the time said calves were seized by said defendant they were in his possession, and denies each and every other allegation of the said answer."

The issues made by the pleadings have been stated, because to some extent at least they seem to have been lost sight of in the trial of the case, and as an answer to the first objection of the plaintiff in error that the action is brought to recover for the misconduct of an officer in office, of which a justice of the peace would not have jurisdiction.

An examination of the petition will show that the action is for the conversion of the property—for its value, and not for misconduct. In this regard the action is substantially like that of *Miller v. Roby*, 9 Neb., 471, and *Neihardt v. Kilmer*, 12 Id., 85. In the latter case it is said in the syllabus that a justice of the peace has jurisdiction of an action for the taking and converting of personal chattels of the value of two hundred dollars or under, and is not ousted of such jurisdiction by pleading and proof that defendant took such chattels by virtue of an execution, he being the sheriff. These cases are decisive of this question and the first objection is not sustained.

2d. That the court erred in suppressing the testimony of Spielman. The record contains the following stipulation:

"THOMAS FLYNN,	}	Stipulation.
v.		
BENJAMIN SPIELMAN.		

"It is hereby stipulated and agreed by the parties hereto that the evidence of Benjamin Spielman so given on the

trial of this case, in March, 1883, may be used and given in the next trial of this case as his testimony, provided that he is not present or within the jurisdiction of the court at the time of trial, July 20, 1883."

This stipulation was signed by the attorneys for both parties. It appears that the attorneys for the defendant below had procured from the court reporter a copy of the testimony of Spielman on the former trial; that on the day of trial the attorneys for the plaintiff below asked for an order to permit them to inspect such testimony. The record shows that, "thereupon it was ordered that counsel for defendant submit said evidence to the inspection of plaintiff's counsel immediately, and that on failure so to do said evidence be excluded from the jury on the trial of this cause." The order also recites that "this motion was first made on the day of trial and after the case was called for trial." The order does not seem to have been complied with, and when the attorneys for the defendant below offered a certified copy of the testimony of Spielman in evidence, it was objected to for the following reasons: *First*, Because of the refusal of the attorneys for Spielman to permit an inspection of the testimony. *Second*, Because there is nothing to show that "this is the evidence of Benjamin Spielman on the former trial of this case." *Third*, There is nothing to show that this is all the evidence given by Spielman on the former trial. *Fourth*, That there is no certificate or anything else to show that this is a true and correct copy of the testimony of Spielman. These objections were sustained, and the testimony excluded. The certificate is as follows: "This is all of the testimony of Benjamin Spielman. Sig. E. M. Battes court reporter, copied by M. E. Wheeler," the court reporter at the time of the trial. This certificate although not very formal is sufficient *prima facie* to show a correct copy of all of Spielman's testimony.

The present act to provide stenographic reporters for the district courts was passed in 1877, and is substantially em-

bodied in chapter 19, Comp. Statutes, section 47 of which provides that "the said reporter shall attend all terms of the district court held within and for the district for which he is appointed, and shall make a stenographic report of all oral proceedings had in such court, including the testimony of witnesses, with the questions to them, verbatim, any further proceedings or matter when directed by the presiding judge so to do."

Sec. 48 provides that "said reporter shall keep and maintain an office within the district for which he shall be appointed, and shall keep and preserve in his said office all stenographic reports made by him as in this subdivision required. Such records shall be the property of the state, and upon the termination of his office the said reporter shall deliver the same to his successor in office."

Sec. 49 makes it "the duty of such reporter to furnish on the application of the district attorney, or any party to a suit in which a stenographic record of proceedings has been made, a long-hand copy of the proceedings so recorded, or any part thereof, for which he shall be entitled to receive, in addition to his salary, a fee of five cents per hundred words, to be paid by the party requesting the same," etc.

It will be observed that the statute makes the office a public one, and requires it to be kept in the district where the reporter is exercising the duties of his office; that the reports themselves are designated records and declared to belong to the state, and it is made the duty of the reporter to furnish a long-hand copy of the proceedings in a suit or any part thereof to any party to the action. From the necessity of the case such transcripts must be certified.

Sec. 408 of the code provides that "duly certified copies of all records and entries or papers belonging to any public office, or by authority of law filed to be kept therein, shall be evidence in all cases of equal credibility with the original records or papers so filed."

This section, no doubt, applies to the records of evidence kept in pursuance of law by a court reporter, and the copy would be admissible in all cases where it would be proper to use the original.

Chapter 74 of the Comp. Stat., authorizes all persons interested in the examination of public records to make such examination free of charge during the hours the respective offices are kept open. The original was open to the inspection of either party, and either or both upon payment of the necessary expenses could have procured a copy. There was no reason, therefore, for demanding before the copy was offered in evidence an inspection of the same, or for the court to make a compliance with such order a condition of offering the copy in evidence. Had the original record been lost or destroyed the rule no doubt would be different, because then the copy would perhaps be the best evidence of what the original was.

Sec. 894 of the code provides that "either party or his attorney may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper, or document in his possession or under his control containing evidence relating to the merits of the action or defense." It is pretty clear that this section relates to books, papers, or instruments where the originals, or at least the exclusive copies, are in possession of the adverse party, and does not refer to public records open to the inspection of either.

The question is very fully discussed in 2 Phillips on Evidence (4 Am. Ed.), pages 304-336, and although our statute has enlarged the rule somewhat, the writer has been unable to find a single case to sustain the ruling of the court below. The court therefore erred in its order, and under the stipulation of the parties, in excluding the testimony of Spielman.

3d. The testimony of Spielman was material to his defense, without which it is apparent he could not safely

proceed to trial. The court, therefore, having excluded that, should have granted a continuance. Suppose this testimony had been in the form of a deposition, which on the motion of the adverse party had been suppressed, it will not be seriously contended that the defendant below upon terms as to payment of costs would not have been entitled to a continuance. He is equally so now. There is no doubt the copy of Spielman's evidence set out in the record is substantially what he would have testified to had his deposition been taken. Where, therefore, such evidence is suppressed and it is so material that the party in whose favor it was taken cannot safely proceed to trial, a continuance upon such terms as may be just should be granted.

4th. As stated at the outset, the case was not tried upon the issues made by the pleadings. This issue is simply whether the transfer of the property in question was made to hinder or defraud creditors of O'Hearn. The case must be tried upon the facts then existing, not upon what may have transpired between O'Hearn and other parties months afterwards. In other words, did O'Hearn transfer this property to Lynch to prevent it from being applied in payment of his debts, and did Lynch have knowledge of such facts in connection therewith as would have put a man of ordinary prudence upon inquiry? This must be determined from the facts and circumstances then existing. As there must be retrial of this case we will not discuss the facts.

Some objection is made to the instructions, but as in the next trial the actual questions involved and no others will probably be tried, it is unnecessary to review them.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., concurs.



REESE, J., dissenting.

I cannot agree with my associates in the conclusion reached in this case, in holding that the trial court erred in the exclusion of the testimony of plaintiff in error offered on the trial of this cause.

By reference to the stipulation it may be seen that the testimony of Spielman might be used and given in evidence in the trial. There is no intimation in the record anywhere that the copy of the testimony was the especial property of the plaintiff in error, that it had been procured at his expense, or that it was not the property of the defendant in error, nor procured at the joint expense of both. It was stipulated that this testimony might be used in the trial. Not by plaintiff in error to the exclusion of defendant in error, but rather by either party to the action. For aught that appears, and in support of the holding of the trial court, we must presume, and a proper construction of the stipulation must be, that either party had the right to use this testimony. At the commencement of the trial defendant in error asked permission to see this testimony, presumably that he might use it, or perhaps to examine it to ascertain whether or not he desired to exercise his right to introduce it. He was refused the use of it, which by the stipulation, was his right. The court was asked to order the production of the testimony. Upon a full hearing, and presumably upon a full knowledge of the facts, he ordered plaintiff in error to produce the desired paper. This order was conditional, easy to be complied with, reasonable, and no doubt just. The application appealed to the discretion of the court. It must be presumed, in the absence of a contrary showing, that the order of the court was based upon sufficient evidence. It would be a waste of time here to cite the many and uniform decisions of this court to the

effect that error will *never* be presumed—it must affirmatively appear. Nothing is here to show what the evidence upon which the court acted was. But were it otherwise, I think a decision which would deprive a trial court of the necessary and proper discretion in such a case would be wrong. I cannot see how it can possibly “affirmatively appear” that the court erred in making the order.

After the order was made, plaintiff in error, with full knowledge that he could not introduce the testimony without a compliance, defied the court and its order and refused to allow an inspection of the testimony. If the order was right, which it must be presumed to be, the court did right in enforcing it. When the time comes that an order of court, made in a case then on trial, concerning documents and instruments to be used in evidence, and to which the parties by their stipulation are equally entitled, may be promptly reversed and nullified by one of the parties to the action, and the authority of the court be thus ignored, it will then be time for the judge to vacate the bench and seek some other field of labor.

Again, there is nothing in, on, or about the offered testimony, anywhere, to show that it is the testimony of plaintiff in error “given on the trial of this case in March, 1883,” or at any other time. It is headed with the words, “Direct examination of Benjamin Spielman by Mr. McAllister,” and is followed by the words, “This is all of the testimony of Benjamin Spielman,” and to which the name of the court reporter is added in print by type-writer. When the testimony was taken, in what court, or in what case nowhere appears. As to whether Mr. Wheeler was court reporter at the time he made the copy, or whether he copied it from the records of his office nowhere appears. For the purposes of this case we may admit all that is said in the opinion of the majority as to the reports of the evidence being records, and that duly certified copies may be used, etc., and that they are entitled to all the credit of

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 VanSant v. Butler.
 

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certified copies of any records. But how is this copy certified? It cannot be claimed that E. M. Battis copied it, for it is shown affirmatively that it is copied by Mr. Wheeler. If it is "duly" certified by him, that certificate is all included in the words "copied by." Again, this "certificate," if such it is, is not signed officially, no official title being used. Suppose in a case on trial it should be stipulated that a judgment of a court between the parties might be "used or given" in the trial, but instead of the judgment a party presents a copy of a judgment which failed to show the parties between whom it was rendered, and instead of the usual official certificate as to its genuineness, etc., it should be followed by the words, "copied by John Doe," without any suggestion of official character on the part of the *copyist*. Would it be treated by any court as a "duly certified copy" of the judgment referred to in the stipulation? If so I confess that my reading has been at fault.

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WILLIAM E. VANSANT, PLAINTIFF IN ERROR, V. CHATFIELD H. BUTLER, DEFENDANT IN ERROR.

1. **Public Lands of United States.** The rulings of the register and receiver of a government land office upon questions of fact as to the rights of respective claimants to lands under the laws of the United States, in matters properly before them for decision, and which are unreversed and in full force, cannot be questioned collaterally.
2. **Evidence: PRESUMPTIONS.** Legal presumptions are in favor of the regularity of the proceeding of courts established by law in matters over which they have jurisdiction.

ERROR to the district court for Gage county. Tried below before BROADY, J.

19	351
21	578
19	351
47	949

*Hale & Bourne*, for plaintiff in error.

*Hugh J. Dobbs*, for defendant in error.

REESE, J.

The original action in this case was in ejectment. The suit was instituted by defendant in error. Plaintiff in error by his answer alleged that on the 23d of June, 1881, one Valmore J. Smith made application to the public land office to purchase the land in question under the act of congress of March 8, 1879, being an act to amend an act to provide for the sale of a portion of the reservation of certain confederated tribes of Indians. That his application was accepted by the register and receiver of said land office, and that on the 17th day of November, 1882, Smith sold and conveyed said land to defendant in error. That the sale was without consideration, and void as against the rights of plaintiff in error, said Smith never having obtained title to the land, or any legal or equitable right therein. That the law under which Smith's application to purchase was made required actual settlement upon the land as a condition precedent to the right to purchase, and that Smith made no such settlement, and never has done so. It is also alleged that defendant in error has made no actual settlement as required by law, and that his pretended title is in fraud of the rights of plaintiff in error.

It is further alleged that on the 20th day of March, 1883, plaintiff in error made application to the local U. S. land office at Beatrice, to purchase the land in dispute, and then offered to prove that he was the only person who had ever made actual settlement upon the land, and that defendant in error and his grantor, Smith, has failed to comply with the requirements of the law regulating the sales of said lands. This application of plaintiff in error was re-

jected by the register and receiver of the land office. That on the 21st of March, 1883, plaintiff in error made actual settlement upon the land and has lived thereon continuously ever since, making lasting improvements thereon of the value of about \$475. Defendant in error demurred to this answer and the demurrer was sustained by the district court. This ruling is here assigned for error.

The act of congress referred to, and under which plaintiff in error claims to have made his settlement and offer of proof was the act of March 3, 1879, being an act to amend an act to provide for the sale of a portion of the reservation of the confederated Otoe and Missouri, and Sac and Fox, of the Missouri tribe of Indians in the states of Kansas and Nebraska. That portion of the act which bears upon the question of the application to purchase and which can apply to the case at bar is as follows: "That after the survey and appraisement of said lands the secretary of the interior shall be and is hereby authorized to offer one hundred and twenty thousand acres from the western side of the same for sale, through the United States public land office at Beatrice, Nebraska, in tracts not exceeding one hundred and sixty acres, for cash, to actual settlers or persons who shall make oath before the register or receiver of the land office at Beatrice, Nebraska, that they intend to occupy the land for authority to purchase which they make application, and who shall within three months from the date of such application make a permanent settlement upon the same, in tracts not exceeding one hundred and sixty acres to each purchaser. 20 U. S. Statutes at Large, 471.

So far as is shown by the answer no effort was ever made to procure a review of the rulings of the register and receiver by an appeal either to the commissioner of the general land office or the secretary of the interior. For aught that appears in the answer, plaintiff in error was fully satisfied with the ruling of the officers of the gov-

ernment land office in Beatrice, by which his application to purchase was rejected. It appears that the rejected application of plaintiff in error to purchase was not made until nearly two years after the accepted application of Smith was made, and about four months after the sale by Smith to defendant in error. It is true the answer alleges that no settlement was ever made on the land by Smith prior to his application to purchase, but there is no allegation that the proof of the intention to occupy was not made as required by the act above quoted. The presumption is that the law was complied with, that the officers did their duty and that the proceedings were regular.

The question of settlement must have been presented to and passed upon by the officers of the government before the title of Smith could be obtained. No allegations of fraud are made with regard to his purchase. The questions of fact presented by his application as well as those of plaintiff in error were decided, and those decisions cannot be collaterally assailed. They are final. *Smiley v. Sampson*, 1 Neb., 56. *Kiney v. Degman*, 12 Id., 237. *Rush v. Valentine*, Id., 518.

It may be said the first decision was *ex parte*, so far as plaintiff in error was concerned, and this may be conceded, as it was long before he asserted any claim to the property; but this does not aid him, for his alleged settlement was not made until long after the rights of Smith had been established and his purchase approved by the government. In such case it would seem that the general government only could complain if dissatisfied with the sale.

We see no error in the ruling of the district court, and it is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

O. O. WELLS AND J. C. FLETCHER, PLAINTIFFS IN  
ERROR, v. WILLIAM LAMB, DEFENDANT IN ERROR.

19	355
49	462
19	355
59	821
19	355
60	483

**Assignment for Creditors.** That part of section six of chapter six of the Compiled Statutes, which requires an assignment of property for the benefit of creditors to be recorded within twenty-four hours after its execution, construed, and the word "execution" held to include the delivery of the assignment and the surrender of control over it.

REHEARING of case reported 18 Neb., 352.

*Griggs & Rinaker*, for plaintiffs in error.

*Cobbey & Summers*, for defendant in error.

REESE, J.

This case was decided at the last term of this court, and is reported in 18 Neb., 352. A motion for a rehearing having been granted it has been submitted upon able and exhaustive briefs and printed arguments. To the questions involved we have given close attention, and are led to the conclusion that the first decision is correct and must stand.

It is not deemed necessary, even had we the time at our disposal, to enter into an elaborate review of the positions contended for by plaintiffs in error, and we must be content by simply stating our conclusion upon one point which seems to be urged with much earnestness by them. It is insisted that as more than twenty-four hours elapsed after the *signing* of the assignment and before it was recorded, therefore it is void under the provisions of the assignment law of this state. Comp. Stats., chap. 6. Especial attention being called to sections one and six thereof.

Section six provides that the assignment shall be in writing, shall be executed and acknowledged as convey-

ances of real estate in order to entitle it to be recorded. "And within twenty-four hours after its execution it shall be filed for record in the clerk's office of the county in which the assignee resides." It is contended that the word "execution," in this quoted clause, refers merely to the signing and not to such other acts as may be necessary to pass the title of the assigned property beyond the reach or dominion of the assignor. We cannot adopt this construction and give such limited meaning to the word. It is conceded that there is no fixed rule of law as to the meaning of the word "executed" or "execution," as applied to the making and completion of written instruments, and that it is often used as including all acts by the maker as may be necessary to make it a completed transaction. But it is contended that as used in the act, the sense in which it must be applied in connection with the context must be limited simply to signing.

We do not care now to discuss whether the language of the first section is intended to apply with strictness and exaction to the matter of recording, but for the purposes of this case may grant all that is claimed by plaintiff in error for it.

By section five it is provided that the sheriff of the county where the assignor resides must be named as the assignee. The assignment must be delivered to *some one* to give it effect. This delivery would naturally be to the sheriff, yet it is quite probable, as claimed by plaintiff in error, that it might be delivered to the county clerk for record by the assignor and the title be thus passed by act of law to the sheriff without any formal acceptance by him. But it seems to us that before the instrument can have any legal force or effect, in other words, before it can be said to be *executed*, it must pass from the control and dominion of the assignor. It could not be claimed that if a debtor should write out and sign an instrument of assignment, but being uncertain as to the necessity of the



step, place it in his pocket or safe, that such assignment would thus be *executed*, and his right to pay his debts and continue in business would be destroyed. Nor could it be said that if afterwards, but not within twenty-four hours, he should find it necessary to carry out his previously formed purpose, the assignment would have to be rewritten and signed in order that it might be recorded within twenty-four hours after its execution that it might not be void. Such a construction would not only do violence to the general spirit and purpose of the assignment law, but would result in rendering a compliance with the act in many instances entirely impracticable. The statute is remedial and should receive a reasonable and liberal construction.

There being no error in the decision of the district court the judgment is affirmed.

#### JUDGMENT AFFIRMED.

THE other judges concur.

#### THE CITY OF YORK, PLAINTIFF IN ERROR, V. CATHERINE SPELLMAN, DEFENDANT IN ERROR.

1. **Instructions to Jury.** For reasons, set out at length in the opinion, instruction number 5; *Held*, Inapplicable to the evidence, and erroneous.
2. **Municipal Corporations: INJURIES ON ACCOUNT OF DEFECTIVE SIDEWALKS.** In an action against a city for an injury sustained by the plaintiff by reason of a defective cross-walk, it is incumbent upon the plaintiff to prove on the trial that such defect existed in the original construction of the cross-walk by or under the authority of the city; that the city, through its proper authorities, had notice of the defect which caused the injury; or facts from which notice thereof may reasonably be inferred; or circumstances, from which it appears that the defect ought to have been known and remedied by the city.

19	357
28	772
19	357
33	301
19	357
38	222
39	722
19	357
54	29
54	452
19	357
56	194

3. ———: ———: TRIAL: EVIDENCE. For reasons given at length in the opinion; *Held*, That the trial court erred in withdrawing from the jury the testimony of the witness therein named as to the dimensions of the wooden structure of the cross-walk alleged to have been the cause of the injury, as ascertained by measurement two years after the date of the injury.

ERROR to the district court for York county. Tried below before NORVAL, J.

*Sedgwick & Power*, for plaintiff in error.

*Scott & Gilbert*, for defendant in error.

COBB, J.

The substantial allegations of the plaintiff's petition in the court below are as follows: "That before the happening of the grievances hereinafter mentioned, the defendant had constructed a cross-walk, composed of lumber, on (said) Sixth street, at the crossing or junction of York Avenue street in an improper and negligent manner by leaving the surface or top of said cross-walk at a great elevation above the natural surface of the street or ground, and without making or causing to be made any gradual approach thereto for the passage of vehicles across or over said cross-walk; and kept and maintained said cross-walk in such condition until the happening of the grievances hereinafter mentioned. That on or about the 10th day of January, 1880, the plaintiff and Seymour Spellman were driving with team and wagon on said York Avenue street, using ordinary care and precaution, and in driving over said cross-walk the striking of the wheels of said wagon against the abrupt sides of the said cross-walk, so as aforesaid improperly and negligently kept and maintained, was of such force as to cause the plaintiff to be thrown violently out of said wagon and to the ground, without any

fault or negligence on the part of the plaintiff or of the driver of the said team, or any occupant of said wagon, whereby she, the said plaintiff, received great bodily harm and injury, and was made sick and sore, and was permanently injured and lamed; and has ever since said time, in consequence of said injuries been prevented, from attending to her business, or from performing any services whatever; and was kept to her bed for a long period of time, and has expended large sums of money for medical attendance and medicines, in the sum of \$200, and has been damaged in the sum of five thousand dollars," etc.

Of the above allegations the defendant by its answer, admitted that it caused a cross-walk to be constructed at the crossing of said streets on Sixth street, and across York avenue, and that the plaintiff and Seymour Spellman drove a team and wagon over said cross-walk at or about the time alleged; but the defendant alleged that the said cross-walk was properly constructed of good material and with suitable approaches; and that said cross-walk was not constructed in an improper or negligent manner; and that the said plaintiff was thrown out of said wagon, as she has in her petition alleged, of her own fault and negligence, and not for the reason alleged in her said petition; and defendant denied each and every other allegation of said petition.

The cause was tried to a jury, which found for the plaintiff, and assessed her damages at the sum of \$800. A judgment being rendered thereon, after a motion for a new trial had been overruled the cause was brought to this court on error.

There are thirteen assignments of error, as follows:

- "1. The verdict is not sustained by sufficient evidence;
- "2. The verdict is contrary to law;
- "3. The damages are excessive, appearing to have been given under the influence of passion and prejudice;

" 4. The court erred in giving instruction number two on its own motion ;

" 5. The court erred in giving instruction number three on its own motion ;

" 6. The court erred in giving instruction number five on its own motion ;

" 7. The court erred in giving instruction number eight on its own motion ;

" 8. The court erred in giving instruction number sixteen on its own motion ;

" 9. The court erred in refusing to give instruction number one of instructions prayed by the defendant ;

" 10. The court erred in admitting evidence offered by the plaintiff over the objections of the defendant ;

" 11. The court erred in ruling out evidence offered by the defendant ;

" 12. Other errors, etc. ;

" 13. The court erred in overruling defendant's motion for a new trial."

The plaintiff being called as a witness in her own behalf, testified: On the 10th day of January, 1880, she received an injury at the corner of Sixth street, in the city of York; that she was riding at the time the accident occurred in a two-seated buggy; that Mr. Spellman, her husband, was driving and sitting on the front seat; that she, plaintiff, her son's wife and her son's little girl, a child about two years old, were sitting on the hind seat; no one else was sitting with Mr. Spellman on the front seat. For greater accuracy I quote her testimony :

Q. Well, you may state to the jury how the accident occurred, how you came to be hurt ?

A. Well, we were about coming over that crossing on Sixth street, and Mr. Spellman said there was some one rode along back of us, and spoke to his horse.

Objected to.

We were about to go over the crossing, and the first

thing I knew we were thrown out as we were passing over it; I do not know anything about the others myself.

Q. Immediately afterwards where did you find yourself?

A. At Mr. Reed's.

\* \* \* \* \*

Q. Where did you fall when you went out of the buggy? Did you fall on the ground—which way did you fall—up or down?

A. We were going north.

Q. Which way did you fall when you went out of the buggy?

A. Backwards.

Q. Where did you fall?

A. The seat went out with me and we went with the seat.

Q. Did you fall upwards or downwards?

A. We fell backwards.

Q. Just relate the circumstances, as you understand it.

A. The way I got injured or hurt was falling.

Q. What did you fall on to?

A. Well, I fell across the seat; I did not get out of the seat; it was a high-back seat.

Q. You say you received injuries. What portion of your person was injured?

A. My hip and back.

Q. Do you know how you happened to get into Mr. Reed's house?

A. No.

Q. Why don't you know that?

A. Because I was not conscious, I suppose, and did not know.

Q. What has been your condition since that time?

A. I have been so as to walk on crutches or wheel a chair around the house.

Q. Can you walk without a crutch?

A. No, sir.

Q. Well, can you tell the jury the cause of the accident, how you happened to fall out?

A. It was the crossing was not properly graded up.

Q. Do you know what was the immediate cause of your falling out of the buggy?

Defendant objected as improper.

Overruled. Defendant excepts.

A. It was the walk that caused the accident, the cross-walk not being graded up.

Defendant moved to strike out the above answer. Sustained.

Q. Explain how?

A. It was a bad crossing.

Q. You need not give your opinion about it. If you know anything about the condition of it when you went over it, what occurred when you went over it; what occurred to the buggy?

A. Why the seat, as it struck the crossing——

Q. As what struck the crossing?

A. As the buggy struck the crossing; when the forward wheels of the buggy struck it knocked the seat loose, and I fell out.

Defendant moved the court to strike out all of the above answer in relation to how the accident occurred.

Overruled. Defendant excepts.

Q. State to the jury how Mr. Spellman was driving.

A. He was driving slow, almost on a walk.

\* \* \* \* \*

Q. Had you ever examined this cross-walk before this time?

A. No, but I had passed over it.

Q. Did you ever examine it afterwards?

A. No, sir.

Upon her cross-examination the plaintiff testified as follows:

\* \* \* \* \*

Q. Well, you say you were not driving very much faster than a walk. What kind of a trot were your horses going on?

A. They were not trotting.

Q. What were they doing?

A. They were going slow; we were almost crossing.

Q. It was not a walk, you stated.

A. Not exactly.

Q. Well, what was it, then?

A. It was going real slow.

Q. Was it a trot?

A. No, sir.

Q. I understand you to say on your direct examination that they were not going much faster than a walk?

A. They were not going faster; they were going moderate.

Q. Do you know whether the horses were going faster than a walk or not?

A. No, they were not, I do not think; I was not driving, and could not tell.

Q. I want to know whether the team was going faster than a walk just before this accident occurred?

A. I could not say, but was driving slow, and I know was not driving fast.

Q. You do not know what started up the team?

A. No, I do not.

Q. Mr. Spellman did not strike them with a whip, did he?

A. No, sir; we did not carry a whip.

Q. How far were they from the crossing when they started up?

A. They were almost crossing or just about going over.

Q. The team was just about going over the crossing when they started up, were they?

A. Yes, sir.

Q. About how far were they from it?

A. I do not know how far; they were just on the street that comes east and west going over that crossing.

Q. The team were about the distance of half way across Sixth street from the crossing—is that your answer?

A. I do not know; we were pretty close to the crossing, but I could not tell just how near.

Q. I do not expect you to give the exact distance, but there is a difference between a rod and a mile, and we want some idea?

A. We were pretty close to the crossing.

Q. About how far, some people would call a rod pretty close, and some would call ten rods close?

A. We were right on the street that goes east and west, and right near the crossing.

Q. That is, you came along from the south, and the horses had just about got to the middle of the street that goes east and west when they started up. Is that it?

A. They were pretty close to the crossing, I could not tell just how many feet.

Q. Is that what you mean to say, to the best of your recollection, that the horses had just about got to the middle of the street that goes east and west, when they started up?

A. I think it was a little nearer than the middle of the street, but I am not positive about that.

\* \* \* \* \*

Q. You do not know of your own knowledge whether any one just at that time came along on horseback or not?

A. No, sir.

Q. Nor whether that was what started up the team or not?

A. No, I do not. The first I knew I went to grab hold of something when the seat started and I fell out.

Q. Well, which way did the seat start?

A. To one side, it started up when the forward wheels struck; and when the hind wheels struck we went out on the ground, seat and all.



Q. Did the seat start backwards or forwards?

A. It went back; it fell out backwards.

Q. The first you noticed that there was anything going wrong was the seat started to go back?

A. Yes, sir, and as it started I reached for something to get hold of.

Q. Did the others that were in the seat with you fall out also?

A. Yes, sir, those that were on the back seat.

Q. You all went out together?

A. Yes, sir, my son's wife and little girl, and me.

Seymour Spellman, a witness called by the plaintiff, testified: That the plaintiff is his wife; that at the time she received the injury spoken of by her, she, together with the wife and little girl of witness's son, were in the wagon with witness, and witness was driving. I quote in part, his further testimony.

Q. Just relate to the jury, commencing at the time you struck that street where the accident occurred, the circumstances?

A. Well, we started to come up to my daughter's, who lived a little west and north of there. After crossing the bridge we struck an angling road straight up 5th street, and we took that road and angled off past where the old grist mill stands, and came along about to where Hesser now lives, on York avenue, and we were passing quietly along until we were crossing 6th street, and there was a man came from towards town, riding a horse, and I just noticed him, and thought he would not interfere with me, and just as he passed behind the wagon he struck his horse with something, either a whip or a halter, and says sharp to him, "get up," and my horses was opposed to that, and they sprang, and was so near the walk that the wheel struck, it made the buggy bound up, and when it struck again the seat broke loose, and dropped onto the ground.

\* \* \* \* \*

Q. Explain to the jury how you were driving?

A. Why, I was driving at a moderate rate, as we usually go, I do not know whether the horses had got down to a walk, but I know it was very slow, as we were approaching the cross-walk, until he struck his horse, then they jumped.

Q. How did you handle them?

A. I had them under control, as I always have. It was a quiet team. One of them was 16 years old, and she knew very well how to behave.

Q. Explain to the jury the condition of that crossing?

A. Well, I thought it was about a new crossing. It never had been graded up, but lay on the top of the ground.

Q. Can you explain the construction of the walk?

A. Well, yes, sir, somewhat.

Q. Just explain as near as you can?

A. It perhaps was something in that shape (witness shows with two books), with stringers inside here, to go across of the usual style of 2x6 ties, and plank on top, and then this piece set on an angle.

\* \* \* \* \*

Q. You were going north, were you?

A. Yes, sir.

Q. How about the surface of the ground from here south?

A. It was lower as you went south from it, where the water had washed in there. I think the water runs from the west to the east, and it made the ground a little lower, on this side it was not graded up at all, and on the north side, a little way from it north, there was a place where water had stood in the road.

Q. Explain to the jury, as near as you can, just how the wheels struck the approach plank, from the top of the walk down to the ground, what was the thickness of it?

A. Two inch plank.

Q. Explain to the jury how your buggy wheels struck the plank approach?

A. They would strike here, of course (witness illustrates with books).

Q. Whether at the top, or at the bottom, or in the center?

A. They would naturally strike towards the bottom.

Q. How did the buggy act after the fore wheels struck the buggy? (sic!)

A. That would throw the forward end up, and it did throw it up; and when the hind wheels struck it, it threw it more, and it passed from under the seat.

Q. Where did Mrs. Spellman fall to?

A. She dropped just north of the walk on the ground. The momentum of the buggy received from the jump threw the buggy from under the seat, and broke it loose, and threw the seat out.

Upon cross-examination, among other things the witness testified as follows:

Q. Did you see just how the women fell?

A. Yes, sir, I know how they were when they struck the ground.

Q. I mean when they fell out of the buggy. Did you notice them or were you looking at the horses?

A. I could not say which way I was looking.

Q. You cannot say whether you saw them start to fall or not.

A. No, sir.

Q. So, of course, you do not know which way they first fell?

A. I know they fell back.

Q. That is, eventually, they got out backwards?

A. Of course I do.

Q. Do you know whether when the seat first broke, it broke backwards? Do you know that?

A. Yes, sir.

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Q. In regard to the way this crossing was made. You say that the stringers were 2x6's?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. How do you know that?

A. I looked at it.

Q. You got out and examined it, did you?

A. Not at that time.

Q. But after that you examined it?

A. Yes, sir.

Q. As I understand you, there was a plank approach on one side?

A. Yes, sir.

Q. That ran from the top of the crossing down to the ground, in a slanting position, did it?

A. I could not say whether it rested on the ground, or not.

Q. It went angling to the ground?

A. It went angling out, yes, sir.

Q. I believe you said there was a low place in the ground, and there was water alongside of the walk?

A. On the north side of the walk there was water stood there.

\* \* \* \*

Q. When was it that you examined it as to these stringers?

A. It was quite a time after that.

\* \* \* \*

Q. What did you examine it for?

A. To see how much of a raise there was.

Q. Did you conclude how much of a raise there was?

A. I did. My judgment would be between six and seven inches.

Q. That is based upon your judgment?

A. Yes, sir.

Q. You did not take a measure and measure the raise above the ground?

A. No, sir.

W. A. Reed, sworn and examined as a witness on the part of the plaintiff, testified as follows:

\* \* \* \* \*

Q. State whether you examined the street then, and the state of the crossing, and the kind of a crossing it was at this time?

A. I did look at it, yes, sir.

Q. State to the jury the condition you found it in then?

A. The south side was not graded up at all, and the ground 18 or 20 inches from the crossing was as low, if not lower, than the foundation of the crossing itself.

Q. And how was the street generally below there, was it higher or lower than the foundation of the crossing?

A. It was certainly not any higher.

Q. How was it next to the crossing?

A. There had been a little earth thrown next to the approach board, and I supposed a little earth thrown along between it and the ground.

Q. What was the thickness of the approach board?

A. Two inches.

Q. Thicker than this book, was it? (Shows witness a book.)

A. Yes, sir.

Q. The approach board was as thick or thicker than that book, was it?

A. It was some thicker than that.

Q. Explain to the jury by this book?

A. The earth was thrown along here, to fill in from this edge to the ground. The sills were sloped off to the slope of this plank, and then they made the face of the walk; and when this board was up against that, it did not come to the ground. Here there had been earth thrown along between the edge of this approach board and the ground.

Q. How far south of this was the dirt put there?

A. Certainly not to exceed 18 inches at most, and I think not to exceed a foot.

Q. You state that before this dirt was banked up here, that this board did not come to the ground?

A. No, sir, it did not.

Q. How about the upper edge. I mean the upper edge of the lower portion of the approach.

A. The earth came up just about the lower edge, the upper edge of the south edge of the board.

Mrs. E. K. Reed was also sworn and examined as a witness on the part of the plaintiff, and testified that she is the wife of W. A. Reed, the witness last on the stand; that she was living with him at the time the accident occurred; that she was at home and sitting in the north-east room and saw the wagon as it was driven up there.

I quote her testimony:

Q. When did you first see it?

A. When it passed to the east of our house.

Q. How far from the cross-walk was it then?

A. Well, perhaps 30 feet.

Q. Well, how was he driving?

A. On a very slow trot.

Q. Did you see Mr. Spellman's wagon from that time until the accident occurred?

A. Well, just while it was passing the north-east corner of the room I did not.

Q. Did you see it at the time the accident occurred?

A. Yes, sir, I did.

Q. State to the jury just what you saw.

A. I saw them approaching the walk, as they were coming on a very slow trot; and I saw a horseman coming up, and the horses gave a little spring, and threw the ladies out.

Q. Did you notice how it happened, what caused the fall of the ladies?

A. I saw the horseman come riding up from town, and he struck his horse. I did not hear him speak to the horse; and just as he struck his horse Mr. Spellman's horses gave a spring, and gave the buggy a very severe shock, and the ladies fell out behind.

Charles Spellman, a witness on the part of the plaintiff, was sworn and examined, and testified as follows:

\* \* \* \* \*

Q. Did you ever see this walk?

A. Yes, sir.

Q. How long after this accident was it?

A. It was the next day.

Q. State to the jury if you examined the walk?

A. I did not closely, I walked over it, and stopped and looked at it. I did not take any measurements.

Q. What was the condition of the street south of it and the approach up to it?

A. There was no approach, only this plank and that lay up to the side. It was never filled any there at all.

Q. How was the street south, was it higher or lower than the street north of the walk?

A. It was lower.

Q. How much lower.

A. Well, I could not say exactly.

William Spellman was also sworn and examined as a witness on the part of the plaintiff, and testified as follows:

Q. Did you ever examine this cross-walk?

A. Not particularly; I passed over it.

Q. Explain to the jury just how it was?

A. It was a walk made of plank, and there was a plank set up edgewise, about that way, upon the walk. (Witness illustrates with a book.)

Q. How was the approach from the street to this plank that was set up edgewise?

A. It was lower than the walk was, considerably.

Q. How long after the accident was it, that you saw the walk.

A. I cannot tell exactly; it was not but two or three days.

Q. Did you examine this plank approach that was up against the walk as to the condition of the lower edges of the approach?

A. Yes, sir.

Q. How was it?

A. Why, it did not come to the ground, that is, it was set on the ground.

Q. Was there any dirt thrown up underneath it?

A. No, there was only just the plank on top of the ground. There was not dirt thrown up on the plank.

Q. I mean underneath here? (Shows witness with a book.)

A. Yes, underneath there was.

Q. How was it about the upper edge; whether it was covered or exposed?

A. It was exposed.

George E. Moore, a witness on the part of the plaintiff, testified that he knew the time of the accident, and saw the crossing on the third day after plaintiff was hurt. I quote:

Q. You may describe the condition of it as you saw it then?

A. Well, the way I saw it was a plank sidewalk; the approach of the sidewalk was in that shape (witness illustrates with his hands), just about that shape, with no filling. I know nothing about it, only as I saw it.

Q. What height was it from the ground.

A. Well, I could not tell as to that, for I did not measure it; but I should judge from the looks of it, I should think it was about six inches of a raise.

Q. Was there any fill on the street south of it?

A. No, sir.

Q. To make a grade?

A. No, sir.



Samuel Leavitt, a witness on the part of the plaintiff, testified that he is a son-in-law to the plaintiff; saw the crossing where she was hurt; passed over it almost every day; lived in town; came down to the crossing within an hour; did so in company with plaintiff's husband; don't remember that he made an examination of the condition of the walk at that time, but did soon after. I quote:

Q. Well, how was it as to the approaches from the south side?

A. It was abrupt there, and no dirt, and it was 2x6.

Q. That is, you mean by that, the approach from the south side up against the walk?

A. Yes, sir.

Q. Did you examine to ascertain whether this upper edge of the lower part of the approach was covered or exposed?

A. I do not know that I did. I do not know whether there was any dirt there or not.

Upon his cross-examination, among other things, this witness testified as follows?

Q. How high was the top of the crossing above the level of the ground?

A. If there was no dirt it would be six inches high and the slant would take off a little.

Q. Do you know how much you would take off for slant?

A. No, sir.

Q. Do you know if, for instance, the approach is laid up, slanting up, to come up on the crossing, and that approach is six inches wide; now suppose the approach is six inches wide, and it rests upon the ground at the bottom, and that the top of it is as high as the crossing, and it is laid down so as to make an approach, do you know how much the elevation of the top of the walk would be less than six inches.

A. Not exactly; but I have an idea.

Q. What is your idea ; is it more than two-thirds as much ?

A. It would depend on how much of a slant you would give it and how the crossing was to lean to.

Q. You do not know, then, how high that crossing was above the level of the ground ?

A. I never measured it.

Q. Did you say that there was no dirt put up to the foot of the approach ; was there not some dirt put in here, to the foot of the approach, to make a gradual approach to the foot of the approach ; was it not a gradual slant from back a foot, or a foot and a half from the foot of the approach ?

A. Think there was a little dirt back there.

Q. Was there not enough to make a gradual slant from back a foot or eighteen inches up to the foot of the approach ?

A. I do not know.

On the part of the defendant, Henry Seymour testified that he was well acquainted with the cross-walk in question at and about the time of the accident and at the time it was built. I quote :

Q. State your facilities for knowing its condition.

A. I lived one street south and about four or five blocks west of there, and there was no walk on the street that I lived on at that time, and I always went over to this street north and came to town to my business ; my business was at the depot at that time and I traveled that street usually not less than once a day ; when it was wet I went that way, and I got in the habit of going that way and I went that way when it was dry.

Q. Do you remember the time the accident occurred ?

A. I do not remember exact time, but I remember the circumstance.

Q. State the condition of the walk at that time ?

A. I think there was not much difference in its condi-

tion at that time from its general condition from the time it was built until the time the regular grade was made from this low place north of it.

Q. State to the jury what its height was?

A. I never measured its height, but it was made in the usual manner of making crossings—wooden crossings in this town—I should say either 2x4s or 2x6s, set edgewise, and two-inch plank laid on the top, and the usual approaches.

Q. What width was the approach board?

A. The approach board was a six-inch board or plank and the top was of the same material; at the time the walk was built there was no cuts or grades, and it was made on the level ground; I remember of passing it the day it was built, or the evening that it was built, and there was dirt thrown along each side—fresh dirt—and at that time it came upon the approaches, I should say half way, but the ground being loose it naturally packed and settled away with the rains, so I do not think the dirt was much, if any, above the bottom of the approaches, say after a week or two weeks after it had been put in.

Q. You may state how far the grade extended south of the walk, the dirt that had been thrown up there?

A. I could not state exactly, but it was either hauled or shoveled in.

Q. How far out did it extend?

A. I should think from—well, perhaps in the extreme and perhaps nearer than that; it was not very regular.

Q. You may state about what angle this approach was kept at?

A. I do not know exactly, but I should say it was considerably less than half pitch; it was probably 40 or 45 degrees, or somewhere along there; it was the usual slant for approaches.

Q. You think it was less than half pitch?

A. I think it was less than half pitch; I have also

driven over the walk a good many times; I did business with my team that way; I used to do a little farming at that time, and I used to go that way.

Q. You may state the height of that walk, this cross-walk, from the level of the street?

A. I could not state that particularly.

Q. Give your best judgment.

A. I have already stated how it was built; it was set on the ground, or perhaps set in enough to steady it; I do not think there was anything under these timbers; it must have been from general appearance, never having measured it, but, judging by passing over it hundreds of times, perhaps thousands, since it was built——

Q. I believe you have not stated what its height was at that time above the ground; that is, where the wheels would run on to it from the ground.

A. At no time to my recollection has this ground been below this slanting approach, and the height of this slanting approach I could not exactly say; I know it was 2 by 6, just put on there, and the top of that was as high as the top of the walk.

Q. I believe you said that the bottom of this 2 by 6 rested on the ground and that the dirt reached the edge of that approach.

A. When the crossing was first built the loose dirt was put there and came up on this approach; it came up in many places near to the top, and in many places nearly half way, and some places perhaps a very little; I considered it at the time a temporary grade, for if I remember right that crossing was put in about the time it was freezing up, and they did no scraper work on that road that fall.

C. S. Hesser was sworn and examined as a witness on the part of the defendant, and testified at length as to the description and condition of the street and crossing, in which he agreed in all material respects with the last witness. He had never measured the height of the crossing.

Charles Le Count was also sworn as a witness on the part of the defendant. He testified that he resides in the city, and did at the time of the accident; remembers the circumstance. I quote his testimony in part:

Q. Did you know the crossing where the accident took place?

A. Yes, sir.

Q. You may state what opportunities you had for knowing that crossing at that time?

A. I lived where Mr. Hibbard now lives, and I was keeping a hardware store here in town, and I boarded at home, and I passed over this walk six times a day and sometimes more.

Q. Well, now, do you recollect the circumstance of this walk being constructed there?

A. Yes, sir.

Q. How was it constructed?

A. It is made by 2x6s being rested on the ground, and 2x6s put on for the slant.

Q. What was it covered with?

A. It was covered with two-inch plank all through, and then there was some dirt thrown on the plank.

Q. That is, it was thrown in at the foot of the approaches.

A. Yes, sir, and extending back.

Q. How high did the dirt come up as to the approaches?

A. At the time of the accident it might have come up an inch on the approach.

Q. About what was the slant of this approach?

A. Well, I measured it and know exactly.

Q. Then, you know exactly the height of the slant, do you?

A. Yes, sir; I laid a level on the top and measured down with a rule just three and a half inches to the top edge of the approach.

Q. Three and a half inches from what?

A. From the level of the sidewalk.

Q. From the level of the sidewalk down to what?

A. To the level of the approach of wood.

Q. To the bottom of the approach?

A. Yes, sir.

Q. Now, when did you make that measurement?

A. About a year and a half or two years ago.

Plaintiff moved to strike out the testimony of this witness in relation to the height of the walk, said measurement being made two years after the accident heretofore testified to. Sustained, and defendant excepts.

Q. In speaking of this crossing, without regard to the ground, at the time of your measurement how was the crossing nailed together?

A. It was nailed with spikes.

Q. I will ask you as to how solid it was nailed together, how strong it was, as to whether it gives any or has at any time given any?

A. I do not think it has.

Q. Had it up to this time?

A. Up to this time, no, sir.

Q. It is in the same shape as it was then, so far as the timbers are concerned, is it?

A. Yes, sir.

Defendant's counsel then by interrogations sought to prove by the witness the result of his measurement of the said crossing, but the objection of plaintiff thereto, for the reason that said measurement was made two years after the accident, was sustained and the testimony was ruled out.

There was other testimony which it is not deemed necessary to notice.

The following instructions were given to the jury by the court on its own motion:

"Instructions to jury—

"1. The plaintiff brings this action to recover the sum

of \$5,000 for damages she alleges she has sustained by reason of an alleged personal injury received by being thrown violently out of a buggy in which she was riding while said buggy was being driven over and across one of the cross-walks in the city of York, Nebraska, which cross-walk and the street it was across plaintiff claims was at the time by the defendant negligently permitted to be in an improper and unsafe condition for crossing with vehicles.

"2. It is for you to determine from the evidence and the facts and circumstances of the case whether or not the cross-walk and street where the alleged injury occurred was at the time in a reasonably safe condition for crossing by vehicles, and whether such condition was the proximate cause of the injury, if any, and whether the plaintiff was guilty or not of contributory negligence. (Defendant excepts.)

"3. You are instructed that the defendant is bound by law to use all reasonable care, caution, and supervision to keep its streets and walks in a reasonably safe condition for travel in the ordinary modes of travel; and if it fails to do so, it is liable for injuries sustained in consequence of such failure, provided the party injured is himself exercising reasonable care and caution; and the fact that the plaintiff may have in some way contributed to the injury sustained by her, will not prevent her recovering, if by ordinary care she could not have avoided the consequences to herself of the defendant's negligence. (Defendant excepts.)

"4. The jury are instructed that the defendant is not bound to any greater degree of care and diligence than is sufficient to keep its streets and walks in a reasonably safe condition, and if any accident occurs when they are in such reasonably safe condition the defendant is not liable for such accident. •

"5. If you believe from the evidence that the plaintiff was injured, and sustained damages charged in the petition,

and that the injury was the combined result of an accident and of the defective condition of the street and walk, if any is proven, and that the damage would not have been sustained but for the defect, although the primary cause of the injury was a pure accident, still, if the jury believe from the evidence that the plaintiff was guilty of no fault or negligence, and the accident one which common and ordinary prudence on the part of the plaintiff could not have foreseen and provided against, then the city is liable provided the jury believe from the evidence that the city authorities were guilty of negligence in not remedying such defects. (Defendant excepts.)

"6. You are instructed, as a matter of law, though you should find from the evidence that the injury complained of is the combined result of an accident and a defect in the street or walk, yet if you also find, that by the use of ordinary care and prudence on the part of the plaintiff the accident might have been avoided, you must find for the defendant.

"7. The jury are further instructed that reasonable care and caution required of the plaintiff as mentioned in these instructions, means that degree of care and caution which might reasonably be expected from an ordinary prudent person, under the circumstances surrounding the plaintiff at the time of the alleged injury.

"8. The law is, that the driver of a private conveyance is the agent of the person riding in such conveyance, and if such person while riding along a public street is injured in consequence of the defective and improper condition of the cross-walk, and the driver is guilty of a want of ordinary care and caution, and his negligence materially contributes to such injury, then the person injured cannot recover as against the city for the injury received.

"9. The burden of proving negligence rests upon the party alleging it; and where a party charges negligence on the part of another as a cause of action, he must prove



the negligence by a preponderance of the evidence. And in this case, if the jury find that the weight of the evidence is in favor of the defendant, or that it is equally balanced, then the plaintiff cannot recover and the jury should find the issues for the defendant.

"10. The defendant is not required to have cross streets and cross-walks so constructed as to secure immunity in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty under the law is only to see that its cross-walks are reasonably safe for persons exercising ordinary care and caution.

"11. If you find that the seat was improperly fastened to the wagon at the time of the accident, and that the accident would not have occurred but for that fact, then you will find for the defendant.

"12. If you find that the cross-walk in question was in a reasonably good and safe condition under all the circumstances, you will find for the defendant.

"13. The defective condition of the street and cross-walk, if any, must have been the proximate cause of the injury to entitle the plaintiff to recover.

"14. The rule as to proximate cause is this, that when several concurring acts or condition of things, one of them the wrongful act or omission of the defendant, produces the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury if the injury be one which might reasonably be anticipated as a natural consequence of the act or omission.

"15. If you find for the defendant you will simply return a verdict finding for the defendant.

"16. If the jury believe from the evidence under these instructions that the plaintiff is entitled to recover, then in fixing the damages which she ought to recover you may take into consideration all the circumstances surrounding the case so far as they are shown by the evidence:

such as the circumstances attending the injury; the pain she has suffered, if any; the extent and duration of the injury, and give the plaintiff such damages as you believe from the evidence she has sustained. (Defendant excerpts.)"

Instruction number 1, of instructions prayed by counsel for defendant, the refusal to give which is assigned for error by the plaintiff in error, is not found in the transcript.

I have copied so much of the testimony given on behalf of the plaintiff in the court below as is devoted to the facts and circumstances of the injury to plaintiff and the condition of the street and crossing at the time of the accident; also so much of the testimony offered and given on the part of the defendant as is deemed necessary to show the applicability of the last part of the opinion. I have also copied the instructions entire for the purpose of showing what was not given as well as what was.

It will be seen from the testimony, that while the shape of the wooden cross-walk with its approaches may have been clearly shown to the trial court and jury by means of the illustrations shown by piling books together, yet it is impossible to test here the correctness of such illustrations, as they could not be preserved in the bill of exceptions. But, so far as we can understand the testimony as to the elevation of the cross-walk, it was from six to eight inches above the general level of the street. The top planks were placed on sills placed lengthwise of the street. These sills were 2x6 pine boards. The planks of the walk were of the same material and dimensions. There is a conflict of testimony as to whether these sills were or were not set into the ground. If they were not, the elevation of the cross-walk was eight inches above the general level, yet no witness places it above six or seven inches. The sills were slanted or beveled off at the ends, and side boards, or as the witnesses call them, approach

boards, were spiked on to the ends, extending from the top of the boards, of the walk towards the ground. These boards being of the same width as the sills, and necessarily projecting two inches above the top of the sills in order to be even with the upper surface of the walk, and the ends of the sills being cut slanting or beveled they would not quite reach the ground in any event, even if the sills were sunk into the ground as stated by one or more of the witnesses. This space between the lower edge of these sides, or approach boards, and the general level of the ground was by the great weight of the testimony shown to have been filled in with earth, which extended out at an undefined angle to the general level.

For aught that appears in the testimony, the above is the proper and approved plan for the construction of wooden cross-walks. Indeed, the only evidence that it is not, if any, is that furnished by the fact of the injury to the defendant in error, which furnished the occasion for this litigation. It cannot be denied that the force of such evidence is greatly weakened, if not entirely neutralized, by the accompanying evidence of the sudden starting up of the team behind which the injured party was riding just as the vehicle was crossing the walk; and the fact that she, as well as her companions occupying the seat with her, fell backwards, and not forward, from the vehicle. In this connection I refer to instruction number five of the foregoing instructions. As matter of law I see no objection to this instruction, but to render it applicable there should be evidence outside of and disconnected with the accident itself from which the jury could find "that the city authorities were guilty of negligence in not remedying such defect." As we have already seen, there was no such evidence. Had the cross-walk been shown to have been negligently and improperly built, so as to constitute it an unlawful structure, the jury may have found it rather than the sudden springing forward of the team to

have been the proximate cause of the injury; but to say that the defective cross-walk shall be of the two selected as the proximate cause of the injury, because defective cross-walks are evidence of negligence on the part of the city authorities, and then, that this cross-walk was defective because of this injury, is to reason in a circle and cannot be accepted as satisfactory, and such must have been the course of reasoning by which the jury, under the instruction now being considered, found their verdict. I think that the instruction misled them into the belief that there was evidence before them from which they might find that the city authorities were guilty of negligence in not remedying defects in the cross-walk not shown to exist, and hence, was erroneous. The weight of the evidence certainly was as testified to by W. A. Reed, that at the time the cross-walk was constructed there was earth filled in between the lower and outside corner or edge of the approach board and the ground, which earth so filled in extended out from one foot to eighteen inches from the said approach board. There was also some evidence tending to prove that some of this earth had been washed away by rains, leaving the south side of the cross-walk more abrupt at the time of the injury. It is possible that the condition of the walk on the south side may have been such that had the city authorities had notice of such condition, and had for any considerable length of time failed to restore the earth approach, it would have been evidence of negligence on the part of the city. "But," says Dillon, "as in such case the *basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known, and remedied by it, is essential to liability.*" 2 Dillon's Mun. Corp., § 1024.

In the case at bar there was no evidence of notice to the corporation nor of any fact from which such notice might

be inferred. Nor was the defect in the sidewalk, as sworn to by any witness, of such a character as to make it apparent that it ought necessarily to have been known by the city authorities. No reference having been made to the question of notice by the court in any of the instructions, it may be said that it was the duty of the defendant to present an instruction embodying the law on that subject as applicable to the case, and that a failure to do so amounts to a waiver of all objections on that account. This would be true were it not for the consideration that notice to the corporation is an essential ingredient of the cause of action against the defendant. It is a material link in the chain of facts necessary to fasten liability for the injury to the plaintiff upon the city. This indispensable link, then, being wanting, the plaintiff's evidence fails to sustain the verdict against the defendant. No laches on the part of the defendant short of a failure to apply for relief to the appellate court would amount to a waiver of such defect.

Although this opinion has already reached an unusual length, as there must be a new trial, I deem it proper to call attention to the ruling of the court striking out the testimony of the witness Charles LeCount, of the measuring by him of the wooden structure of the cross-walk and the result of such measurement. As we have already seen, the witness Seymour Spellman had sworn that the cause of the injury was the abruptness of the cross-walk, and the witness LeCount testified that at the time of the accident there was dirt thrown on the 2x6 planks, which were "put on for a slant" which dirt "might have come up an inch on the approach, and extended back from the edge of the approach from a foot to eighteen inches." It therefore became, and was, material to show at what angle the said approach board extended down. With that shown in evidence the jury could come to an intelligent conclusion as to whether the abruptness of the face or elevation of the crossing was the proximate cause of the injury or not.

Such being the case, and it being clearly proved that the wood structure of the walk was firmly spiked together and remained so at the time of the measurement, each plank maintaining the same relative position towards the other pieces, I think that the testimony was material and proper, and that to take it away from the jury was error.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

19 386  
31 213

THE UNION PACIFIC RAILWAY COMPANY, APPELLANT,  
v. THE BURLINGTON & MISSOURI RIVER RAILROAD  
COMPANY IN NEBRASKA ET AL., APPELLEES.

**Municipal Corporations: ASSESSORS OF DAMAGES.** It is the true sense and meaning of the proviso to subdivision 28 of section 69, chapter 14, Compiled Statutes, that before the election of the five disinterested householders therein provided for, an ordinance should be passed, approved, and published, according to law, *prescribing* the manner of such election and the compensation of such householders as assessors; and it is not sufficient that such householders be appointed in gross by ordinance, without such method being prescribed.

APPEAL from the district court of Buffalo county.  
Tried below before GASLIN, J.

*A. J. Poppleton and John M. Thurston*, for appellant.

*T. M. Marquett and J. W. Deweese*, for appellees.

COBB, J.

This action was brought in the district court by the appellant against the appellees for the purpose of enjoining

the erection of a stone grain elevator, then in course of construction by the individual appellees, on ground claimed by the corporation appellee, but which had been formally, at least, taken by the city of Kearney for the purpose of a street. The plaintiff was a large owner and holder of property in said city, some of which abutted on the said street. A temporary injunction was granted; but upon the final trial and hearing to the court a finding was made and judgment rendered for the defendants, and the cause dismissed. The plaintiff brings the cause to this court by appeal.

In support of the finding and judgment of the district court several points are presented, but one which it is deemed necessary to discuss in support of the conclusion to which I have arrived upon a somewhat patient and thorough examination of the case.

The ordinance of the city of Kearney, upon which the proceedings for the condemnation of the ground in question were based, was copied in the record and is here reproduced:

**"AN ORDINANCE TO OPEN NEBRASKA AVENUE.**

*"Be it ordained by the Mayor and Common Council of the City of Kearney:*

"Section 1. That it is hereby deemed to be and it is necessary to open and extend Nebraska avenue, a street now existing and being in said city, from the north line of North Railroad street to the south line of South Railroad street in said city.

"Section 2. That for that purpose the following real estate be and the same is hereby condemned and appropriated to the use of said city as a street for public purposes, to-wit, a strip of land fifty feet in width, bounded as follows:

"Commencing at the point where the east line of Nebraska avenue intersects the north line of North Railroad street, thence south to the south line of South Railroad

street, thence west fifty feet (50), thence north to the north line of North Railroad street, thence east fifty feet (50) to the place of beginning.

"Section 3. That John H. Roe, J. D. Seaman, George E. Smith, Abiel M. Pettis, W. C. Sunderland, all citizens of the city of Kearney, five disinterested householders of said city of Kearney, be and they are hereby elected to determine by assessment the damages suffered by the owner or owners of said property through which the said street is hereby opened and extended.

"Section 4. Said assessors so appointed shall fix a time and place of meeting to make such assessment, and the city clerk shall give to the owners of real estate taken for opening said street at least ten days' notice in writing of the same. Said notice may be served upon the agent of any corporation owning any part of said real estate. Said assessors before making said assessment shall subscribe and take an oath in writing that they will faithfully and impartially make the assessment to them submitted.

"Section 5. Said assessors shall make their assessments in writing, and file the same in the office of the city clerk, together with an affidavit of the due and lawful publication of this ordinance, and an affidavit of the service of the notice hereinbefore provided for upon the owners of said property so taken, or their agents, and the city clerk shall forward to the county clerk a duly certified copy thereof.

"Section 6. The mayor shall tender to the owner or owners of said property, or their said agents, the amount of the assessments so made, and thereupon said street shall be and become open to the public.

"Section 7. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"Section 8. This ordinance shall take effect and be in force from and after its passage and publication.

"Attest :

E. M. CUNNINGHAM,

*"City Clerk."*



The authority on the part of the city to condemn and appropriate private property for the purpose contemplated by said ordinance is found in subdivision 18 of section 69 of chapter 14, of the Compiled Statutes, which is in the following language. I quote only the proviso: "*Provided, That in all cases the city or village shall make the person or persons whose property shall be taken or injured thereby, adequate compensation therefor, to be determined by the assessment of five disinterested householders, who shall be elected and compensated as may be prescribed by ordinance, and who shall in the discharge of their duties act under oath faithfully and impartially to make the assessment to them submitted.*"

The point is that the five householders who made the assessment of the compensation to the owners of the property taken by virtue of the said ordinance were not elected in a manner prescribed by ordinance, and hence the proceedings of the city were ineffectual to appropriate the said property. This is a bill in equity to enforce such condemnation against the acknowledged owner of the fee. It will not be questioned that under the authorities, as well as upon the reason of the case, a condemnation and appropriation to be thus enforced must be *stricti juris*. See Mills on Eminent Domain, § 90, and authorities there cited. It is not sufficient that the jury or appraisers were possessed of all the qualifications provided by law, but they must have been elected in the manner provided by the statute authorizing the appropriation. It is obvious from the language of the proviso above quoted that it was the intention of the law-makers to provide that before the election of the five disinterested householders to assess the adequate compensation to the owners of property taken, or injured, for the purpose contemplated by the said section an ordinance should be passed by the city council, approved by the mayor, and published in accordance with the provision of the charter on that subject, providing a

form, method, and manner for the election of such five disinterested householders, and for ascertaining and fixing their compensation for their services in making such assessment. The well-known rule that in construing a statute some force and meaning must be accorded, if possible, to all of its words and sentences, has been often invoked by this court, and cannot be questioned. Bearing this rule in mind I cannot believe that the purpose of the proviso is satisfied by an election or designation of such householders without any previous rule or *prescribed* manner or method by which they should be elected and compensated. Furthermore, I do not think that the naming or designating of a person or number of persons in the body of an ordinance, embracing other and independent provisions, is an election within the meaning of the section now under consideration.

It is of the very essence of an election by independent voters that each one shall have an opportunity to vote for the candidate or person of his choice without having his vote so cast also counted for some one not his choice, or for some measure not approved by him. In the matter now being considered it is quite reasonable to conclude, indeed it is quite obvious, that the main questions involved in the passage of the ordinance by the common council were the opening of the street and the appropriating of defendant's property therefor; the naming of the persons to assess the value of and damages to the property to be appropriated was the minor proposition, yet I believe it was deemed by the framers of the provision of law now being considered a matter of sufficient importance to engage the attention of the common council, not only as a major but as the sole proposition on which to exercise its power of election, and that, too, after having previously passed an ordinance providing for or *prescribing* the method of such election.

While considering the proviso above quoted we should not lose sight of the word *compensated*. It is very clearly

to my mind the intent and meaning of the language that the compensation or pay of the assessors should be prescribed, fixed by ordinance, before entering upon the discharge of their duties by them. The assessor should be entirely impartial between the city and the property owner; to this end the power to fix the amount of their compensation for their services should not be allowed to remain potential in the city or council until after the services are performed. Such amount or rate to be fixed high or low as the city officers might be pleased or displeased with the valuation of the property or assessment of damages made by such assessors. This construction gives to the language of the section a clear and reasonable meaning. I know of none other which would.

I therefore reach the conclusion that the proceedings on the part of the city of Kearney, as shown by the record, in respect to the election of five disinterested householders to determine by assessment the adequate compensation to be made to the owners of property to be taken or damaged by reason of the opening of said street, did not follow the statute strictly, and hence that the plaintiff as a property-holder of said city acquired no right, either legal or equitable, to restrain by injunction the erection of the grain elevator mentioned in the petition.

Having reached the above conclusion, which, if correct, will sustain the finding and judgment of the district court, it is not deemed necessary to examine the other points raised by counsel and argued in the brief.

The judgment of the district court is affirmed.

**JUDGMENT AFFIRMED.**

**THE other judges concur.**

19	392
25	99
19	392
33	192
33	759
19	392
38	392
19	392
42	904
43	778
19	392
47	61
19	392
53	55
54	437

**HENRY R. GOULD, APPELLANT, v. JAMES R. LOUGHRAN  
ET AL., APPELLEES.**

1. **Judgment before Justice of Peace: COLLATERAL ATTACK.** Where a justice of the peace has jurisdiction of the subject-matter and the parties, a judgment rendered by him after the expiration of the time fixed by statute must be corrected by a direct proceeding for that purpose, and will not be enjoined upon that ground alone.
2. **Injunction: DOES NOT LIE TO ENJOIN JUDGMENT: EXCEPTIONS.** A court of equity will not enjoin a judgment at law unless it appears that the plaintiff has a valid defense, which by reason of fraud, accident, or circumstances beyond his control etc., he was unable to avail himself of.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*Andrew Bevins*, for appellant, cited: *Fox v. Meacham*, 6 Neb., 535. *Williams v. Fowler*, 2 J. J. Marsh, 405. *Freeman Judgments*, 489, 517, 519.

*J. J. O'Conner* and *C. A. Baldwin*, for appellees, cited: *High on Injunctions*, §§ 88, 97, 131. *Crandall v. Bacon*, 20 Wis., 639. *Stokes v. Knarr*, 11 Wis., 407.

MAXWELL, CH. J.

This action was brought in the district court of Douglas county by the plaintiff against the defendant to enjoin the collection of a judgment rendered by a justice of the peace against him for \$100. On the trial of the cause in the court below judgment was rendered in favor of the defendants and the action dismissed. The plaintiff appeals.

No copy of the petition is set out in the record, and there is no very definite statement of what it contains in the abstract. The principal facts appear to be these: That

in November, 1882, Loughran brought an action against the plaintiff before Aug. Weiss, a justice of the peace, to recover the sum of \$200, alleged damages for the wrongful suing out of an attachment; that on the 18th of that month said justice rendered judgment by default in favor of Loughran and against the plaintiff herein for the sum of \$100; that within ten days thereafter the defendant in that action (plaintiff in this) made application to open said judgment and be let in to defend; that the judgment was conditionally set aside and the case set for trial on the 5th day of December, 1882; that on that day a trial was had and judgment rendered for \$100 and costs; that at the conclusion of said trial the justice said: "I shall be obliged to render a judgment against the defendant for \$100." He might have said: "I render judgment," etc. It is claimed that the last judgment was not entered on the justice's docket until on or about February 20th, 1883, when an execution was issued thereon.

The sole ground upon which relief is sought is the want of authority of the justice to render the judgment at the time stated, and *Fox v. Meacham*, 6 Neb., 530, is cited in support of the rule contended for. In that case Fox was a justice of the peace before whom a criminal complaint was made by Meacham against one Collins. After hearing the case the justice discharged the prisoner and rendered "judgment against the state" for costs. Afterwards he issued execution upon this judgment against Meacham and caused his property to be sold by the officer executing the writ. Meacham thereupon brought an action against Fox to recover for the damages sustained by him by the wrongful issuing of the execution and sale of his property. On the trial of the cause, there being no judgment against Meacham on the docket of the justice, it was sought to obtain an order to permit Fox to amend his docket entry in the criminal case against Collins to show a judgment against Meacham for costs in that action, upon the ground

Parker v. Kuhn.

that the prosecution was malicious, and that he so intended his record to be made. The court held that after the entry of judgment by Fox in the criminal case "he could do nothing more in the premises and had no authority to amend, change, or modify the judgment." That, we think, is a correct statement of the law, but it has no application to this case. It clearly appears from the record that a judgment was actually rendered by Weiss in a case in which he had jurisdiction; and the judgment, if erroneous, can only be corrected by a direct proceeding for that purpose. If the judgment was not actually entered upon the docket within the time prescribed by law, that fact may be made to appear, and, if a material error has been committed, the court in a direct proceeding for that purpose will correct it. But courts of equity do not interfere with judgments at law, unless it is made to appear that the plaintiff has a valid defense which he was unable to avail himself of by fraud, accident, or circumstances beyond his control. *Horn v. Queen*, 4 Neb., 108; *Hendrickson v. Hinckley*, 17 How., 443. The facts in this case do not authorize the interposition of a court of equity, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	394
21	678

19	394
32	296

19	394
44	141

19	394
49	854

19	394
160	819

JAMES M. PARKER, APPELLEE, v. NORMAN O. KUHN  
ET AL., APPELLANTS.

**Bill of Exceptions.** Where a bill of exceptions with certain proposed amendments of the adverse party was submitted to a judge for his signature, and held by him in an apparent effort to have the attorneys agree upon certain points, and was signed after more than six months had elapsed from the entering of the decree; *Held*, That the party was not thereby deprived of the right of appeal.

MOTION to dismiss.

*George W. Doane*, for the motion.

*H. D. Estabrook*, *contra*.

MAXWELL, CH. J.

A motion is made by the attorney for the plaintiff "to dismiss the appeal for the reason that the transcript of the proceedings in said case was not filed in the office of the clerk of the supreme court and the cause docketed therein within six months after the date of the rendition of the decree in said cause by the district court." From the certificate of the judge it appears that the cause was tried at the October (1883) term of the Douglas county district court and taken under advisement until the June term, 1884, of that court, at which time a decree was rendered; that said term closed on the 15th of September, 1884, an adjournment *sine die* being had at that time; that thereafter, and as no date is given, presumably within the time authorized by law, a bill of exceptions was presented by the attorney for the defendants to the judge for his signature, together with proposed amendments by the attorney for the plaintiff; that certain exhibits used on the trial were not attached to the bill which the plaintiff's attorney insisted should be attached, but which the defendant's attorney proposed to supply by an admission. The attorneys seem to have disagreed as to the terms of the admission. Afterwards the bill was again presented to the judge. He stated, "with an admission as to the legal effect of the exhibits as testimony," made and signed by counsel for defendants, that the attorney for the plaintiff still objected to the signing of the bill without the exhibits, but upon the "admission of counsel as to their effect, and counsel for defendants thereupon filed and attached another and broader admis-

sion, when upon further consideration I allowed and signed the bill;" that these proceedings occupied the time from one term of court to another, etc., the bill being signed March 8th, 1886. The attorney for the defendant has filed an affidavit showing that the delay in signing the bill was not his fault; that both plaintiff and defendant derive title from the same source, and that the exhibits referred to were patents from the United States for "the land in controversy and mesne conveyances from the patentees to Parker as well as all the court proceedings in numerous foreclosure proceedings and the files therein." No objection is made by the plaintiff's attorney to the correctness of the bill as signed, nor is there any evidence tending to show that the delay was unnecessary or was caused by the fault of the attorney for the defendant; nor is the objection in the motion to the bill because signed after the authority of the judge had ceased. The only question for determination is, shall the defendants be deprived of their right of appeal by the delay of the judge in signing the bill? We think not. It is a well-established rule that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the neglect or misconduct of a public officer the law will protect him. *Smiley v. Sampson*, 1 Neb., 83. *Lytle v. Arkansas*, 9 How., 333. *Dobson v. Dobson*, 7 Neb., 296. *Louderbach v. Boyd*, 1 Ashmead, Pa., 380. *Noble v. Houk*, 16 S. & R., 421. *Railroad Co. v. McPherson*, 12 Neb., 480. *Curran v. Wilcox*, 10 Neb., 449. In the case last cited a correct copy of the stenographic report of the testimony containing the exceptions was not furnished to the attorneys for the plaintiff in error within forty days after the adjournment of the court *sine die*, but the court held that the attorneys had a right to rely on the stenographic reporter for a transcript of the oral proceedings in court, and could not be deprived of a bill of exceptions by the failure of such reporter to



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In re Reed.

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prepare the bill within the time fixed by law. It is said (page 452): "The law will not permit the plaintiff to be prejudiced in his rights by reason of the failure of an officer of the court to do his duty." That rule applies in this case. The same bill substantially as signed seems to have been presented to the judge for his signature. The delay in signing the same no doubt arose from a desire on his part to have the bill, if possible, satisfactory to both the plaintiff and defendants, and not to prejudice the rights of either in any respect. This is apparent from the papers in the case. But no appeal could be taken until "a certified transcript of the proceedings had in the cause in the district court" could be obtained and filed in the supreme court. And as there is no objection that since the defendants obtained the signing of the bill of exceptions there has been any delay on their part, the motion must be overruled.

**MOTION OVERRULED.**

**THE other judges concur.**

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**IN RE W. N. REED, ADMINISTRATOR OF THE ESTATE OF  
ROBERT FRANCIS, V. ESTATE OF THOMAS THOMPSON,  
DECEASED.**

19	397
63	157

1. **Judgment:** OPENING UNDER SECTION 82, CODE. Where proceedings were had under the statute to enforce specific performance of a contract alleged to have been made by a vendor since deceased, and a decree is entered in favor of the heirs of the vendee requiring the administrator to execute a deed, the heirs of the vendor, who were non-residents of the state while the action was pending, and on whom no other service was had than by publication of a notice in a newspaper in the county where the land was situated, and who had no actual notice of the pendency of

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In re Reed.

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the action, may at any time within five years from the entry of the decree apply to the court under section 82 of the code for leave to open the judgment and be let in to defend.

2. —: **AFFIDAVIT OF ATTORNEY.** The affidavit that the party seeking to open the judgment "had no actual notice of the pendency of the suit in time to appear in court and make his defense," ordinarily should be made by the party himself. But if from the peculiar circumstances of the case an attorney has personal knowledge of the want of such notice and makes an affidavit accordingly it will be sufficient to sustain the order when there are no counter affidavits.

APPEAL from the district court of Butler county. Heard below before POST, J.

*Myers, Evans & Steele*, for appellant.

*Marquett, Dewees & Hall* and *W. S. Hamilton*, for appellees.

MAXWELL, CH. J.

In April, 1883, the administrator of the estate of Robert Francis, deceased, filed a petition in the district court of Butler county wherein he alleged that Robert Francis died on the 7th day of January, 1883, intestate, leaving a widow and one minor child; that W. N. Reed was thereupon appointed administrator of his estate and has duly qualified and is acting as such administrator; that on the day and year named one Thomas Thompson died intestate, leaving no widow or heirs in America, and none whatever to the knowledge of petitioner; that H. R. Craig was duly appointed and is acting as administrator of his estate; that during the life-time of said deceased parties said Francis worked as a farm hand for said Thompson at his request, for over eight years, for which Thompson had never paid him anything whatever; that prior to the death of said parties, and in payment for said services, said Thompson executed and delivered to said Francis a contract in writing, in which he

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In re Reed.

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agreed to execute and deliver to said Francis a good and sufficient warranty deed for the east half of the south-west quarter of section thirty-two, in township thirteen, range three, in Butler county, which contract was in full force and effect at the death of said parties, but has been lost. The prayer is for a conveyance of said real estate by the administrator as provided by the statute.

To this petition Craig, as administrator, filed an answer, as follows: "Admits that said parties died as alleged; that the said parties were duly appointed administrators as alleged; that said Thompson died seized of said real estate; that said Francis did work for said Thompson as alleged, but he had no personal knowledge of the execution and delivery of said written contract; that one brother and four sisters of said Thompson live in Ireland, and a cousin named McBride in Ohio, and that they intend to appear and claim the estate.

In March, 1883, the cause was tried and a decree rendered as prayed for in the petition; and a deed appears to have been executed, although it is not so stated in the record. Sometime in the year 1885, the exact date does not appear, one W. S. Hamilton made an affidavit wherein he swears that he is one of the attorneys of record for Jane Thompson, Martha Wyndham, Eliza Colton, and Sarah Hamilton, and that said parties are the heirs at law of Thomas Thompson, who died in Butler county, Nebraska, January 7, 1878, intestate, leaving no widow; that at the commencement of the action said parties were and are residents of Ireland; that said parties have a complete defense to said petition; that during the pendency of the action said parties had no actual notice of the same in time to appear in said court and make their defence, etc. Afterward said parties filed an answer to the petition, verified by the same attorney. In August, 1885, the court made the following order: "This cause came on for hearing after due notice to the petitioner, W. N. Reed, upon the

motion of Jane Thompson, Martha Wyndham, Sarah Hamilton, and Eliza Colton, heirs of Thomas Thompson, deceased, to open a decree heretofore rendered in this action, and after hearing the evidence and argument of counsel the court finds that no other service upon said Martha Wyndham, Jane Thompson, Sarah Hamilton, and Eliza Colton, heirs of Thomas Thompson, deceased, was had in this case than by publication in the *Butler County Press*, and it appearing to the satisfaction of the court by the evidence that the said Martha Wyndham, Jane Thompson, Sarah Hamilton, and Eliza Colton are interested in the estate of Thomas Thompson, deceased, and that during the pendency of the action said Martha Wyndham, Jane Thompson, Sarah Hamilton, and Eliza Colton had no actual notice thereof, and that they have a defense to the same. It is therefore considered that the decree heretofore rendered in this case be and the same is hereby set aside, and that they be permitted to defend." The entering of this order is the error complained of.

Sec. 82 of the code provides that "a party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court by affidavit that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title to any property sold

before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense."

The authority of the plaintiff to institute an action against the administrator of Thompson's estate is derived from sections 323, 324, 325, and 326, of chap. 23, Comp. St., relating to decedents.

Section 329 of that chapter provides that, "whenever any person who is bound by any contract to convey real estate shall die before making the conveyance, the person entitled thereto may have a bill in chancery to enforce the specific performance of the contract by his heirs, devisees, or the executor or administrator of the deceased party who made the contract," etc.

It is unnecessary in this connection to trace the history of these several provisions. The object is apparent, viz., to provide a mode for the enforcement of a contract made by the decedent in his life-time. The parties interested in the decedent's estate are proper if not necessary parties to the proceeding in order that they may have an opportunity to make any defense known to exist against the claim. The parties should be the same as in an action for specific performance. The administrator is a mere trustee whose power to convey is derived entirely from the decree of the court. As a general rule a decree for specific performance between an administrator of the estate of the vendor, and the surviving party to a contract will be rendered, whenever such performance would be decreed in an action between the original parties, if living, unless some intervening equities controlling the case have arisen since the death of the contractor. Willard's Eq. Juris., 269. *Hill v. Ressegien*, 17 Barb., 162. While the defendants who have been permitted to answer in this case were not made parties to the

action, still if their answer is true they have an interest in the property the subject of the action, and in order that their rights in the premises may be determining we see no objection to permitting them to defend. Had the affidavit to open the default been made by the parties themselves instead of one of their attorneys it would have been more satisfactory. It should at least show his means of knowledge. While the statute does not in terms require the affidavit to be made by the party seeking to open the default it is pretty clear that such was the intention, as ordinarily it would be difficult for A to swear that B was not apprised of certain facts. There may be such cases, however, where from peculiar circumstances the knowledge of the want of notice is possessed by the attorney, and we must presume such peculiar circumstances existed in this case. As there are no counter affidavits, there is no error apparent, therefore, in granting the order. The order of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	402
27	379
19	402
30	589
19	402
41	84

WHITE LAKE LUMBER COMPANY, APPELLANT, v. W. G. STONE, IMPEADED, ETC., APPELLEE.

1. **Appeal: FINDING.** The finding of a trial court upon a question of fact, upon which there is a conflict in the testimony, will not be molested unless clearly wrong. Evidence examined, and the decision of the district court, *Held*, To be supported thereby.
2. **Principal and Agent: PRINCIPAL BOUND BY REPRESENTATIONS OF AGENT: ESTOPPEL.** Where an agent was entrusted with the business of carrying on a lumber yard, with authority to sell and deliver lumber for cash or on credit as he saw proper, to collect and receive the money of his principal, file and enforce

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White Lake Lumber Co. v. Stone.

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mechanics' liens or not as he should deem best, this would constitute him, so far as third persons without notice of any limitation would be concerned, the general agent of his principal, and the principal would be bound by a representation or statement made to such third party that no lien or claim was made or would be made upon certain property, for the improvement of which lumber had been furnished by the agent for the principal, and which statement induced such third party, relying thereon, to purchase the property referred to. In such case it was *Held*, No error for the court to refuse to hear testimony to prove a want of authority upon the part of the agent to waive the right to file and assert a mechanic's lien, it being conceded that the party making the purchase had no knowledge of the absence of such authority.

3. **Mechanic's Lien.** The law does not give a mechanic's lien which can be enforced without first complying with the terms of the statute in filing the necessary account and affidavit in the office of the county clerk of the proper county. Prior to the filing of such affidavit the mechanic or purchaser of material has no such interest in the real estate as would require a relinquishment in writing under the statute of frauds.

APPEAL from the district court for Johnson county.  
Heard below before BROADY, J.

*S. P. Davidson*, for appellant, cited: *Matthews v. Sowle*, 12 Neb., 404. *Stoll v. Sheldon*, 13 Neb., 209. *Graul v. Strutzel*, 58 Iowa, 712.

*T. Appelget & Son*, for appellee, cited: *Layet v. Gano*, 17 Ohio, 466. 1 *Parsons Contracts*, 42. *Dinsmore & Co. v. Stimbert*, 12 Neb., 438.

REESE, J.

This is an action to foreclose a mechanic's lien for lumber, etc., furnished for the construction of a dwelling-house on the land of defendant Janousky. The petition of plaintiff contains the usual averments in actions of the kind, with the additional allegation that defendant Stone claims some title to the property, but which is junior and inferior

to the lien of plaintiff. Janousky failed to answer, and default was entered against him. Defendant Stone answered and alleged therein that he had purchased the land upon which the building was constructed, after the construction thereof, but that before purchasing he applied to the agent of plaintiff in charge of its business, and who had sold the lumber to Janousky, for the purpose of ascertaining whether the said plaintiff had or claimed a mechanic's lien on the property, and that he was informed by the agent that plaintiff had no lien or claim upon the premises, nor any claim against Janousky which should become a lien thereon. That relying upon the representations, statements, and promises of such agent he purchased the property. The cause was tried to the court, who found in favor of plaintiff as against defendant Janousky, and rendered judgment for the amount claimed, but in favor of defendant Stone as to the lien, and refused to order the sale of the real estate. From the decree dismissing the action as against Stone plaintiff appeals.

It appears from the record that the whole account against Janousky amounted to \$310.80. Of this \$160.80 had been paid, leaving a balance of \$150.00 unpaid. The last item of the account was furnished November 26th, 1883. The purchase was made by Stone on the 9th day of January, 1884. The affidavit and account were filed in the office of the county clerk on the 23d of February following. Upon the trial defendant Stone testified very positively that a day or two before making the purchase, and pending the negotiations, he called upon the agent of the plaintiff at its usual place of business and enquired particularly if there were to be any claims against the land, and if Janousky owed anything for lumber, etc., and that he was informed by the agent that he had a note for the balance due but that if Stone could make the trade to do so and he would not be molested; that no lien would be claimed or asserted in case the trade was made. That as a part at least of



the consideration would be a store in Crab Orchard, where the agent and defendant Stone resided, he could get the payment out of the store, etc., and that relying on on the statements and representations thus made, he made the trade. This testimony is in part corroborated by that of B. F. Stone, who testified that the agent informed him that if the trade went on he would get his pay out of the store. The agent, J. H. Hanna, testified on rebuttal that Stone came to the office of plaintiff about the time stated by him and enquired whether there were any claims on the Janousky place, and he informed him there were not, and that there were no liens on the property; but that he further said that if the trade was made Janousky would pay him out of the money received, and that if he did not do so a lien would be filed. The witness did not remember saying that he would get the money out of the store if the trade was made.

It is insisted that the finding of the trial court is not supported by sufficient evidence, and that for that reason the decree should be reversed. Upon this feature of the case we have only to say that, in accordance with the settled rule of law in this state when the testimony is conflicting, the verdict or finding in the trial court will be sustained unless clearly wrong. We not only find sufficient evidence in this record to sustain the finding, but are of the opinion that it is supported by the preponderance of the testimony. The finding will, therefore, not be molested on that ground.

Plaintiff sought to show by the testimony of the witness Hanna, its agent, and by that of its vice-president, that Hanna had no authority to waive the taking of liens in any other method except upon payment of the lien itself. This was objected to, and upon plaintiff's counsel stating in answer to an enquiry of the judge that he did not propose or expect to prove that either Janousky or Stone had any knowledge of such fact, the objection was sustained. This is assigned as error. In this we see no error. As to the legal

proposition presented, we concede as sound substantially all that is claimed by plaintiff's counsel. That is, that an agent employed for a special purpose derives from such employment no general authority from his principal, and that such agent would not be at liberty to exercise his discretion in the choice of a mode of performing his duty if some one mode is fixed by usage or order, etc. But we think the record shows that Mr. Hanna was the general agent of plaintiff for the transaction of its business at Crab Orchard. He had authority to sell lumber, either for cash or on credit; to receive and receipt for money and to collect by suit. To make affidavits to accounts and secure mechanics' liens or not as he saw fit, and upon payment to satisfy and cancel liens which he had secured, and such other things as might be necessary to carry out these general duties.

It would be unreasonable to say that it was his special duty to secure a lien in this particular case, or to file and secure liens in all cases. The matter was and must have been left to his discretion and judgment. Now, assuming the finding of the court to be correct, that by his conduct and representations the agent induced Stone to make the purchase, relying upon the statement and promise that no lien existed and none would be claimed, this being within his apparent authority, no good reason can be found why Stone should not be protected from a lien filed a month and a half after his purchase. If, therefore, Hanna was apparently the general agent of plaintiff for the transaction of its business at Crab Orchard, entrusted with the control of its business, it is very clear that he had authority to depend upon the integrity and ability of Janousky to pay the debt in question without seeking the advantage of a mechanic's lien, and his promise to do so would bind his principal.

It is not deemed necessary to discuss the question presented involving the statute of frauds. At the time the promise was made there was no mechanic's lien to be surrendered or canceled; no estate to convey; no instru-

Brigham v. McDowell.

ments in writing necessary. Plaintiff had no lien it could enforce without a compliance with the statute. This by its agent it agreed not to do. Rights of other parties having been acquired by reason of this agreement, plaintiff cannot now repudiate it to their damage.

The ruling of the district court being in our opinion correct, the same is affirmed.

**JUDGMENT AFFIRMED.**

The other judges concur.

19	407
50	816

**FREDERICK A. BRIGHAM, APPELLEE, v. PETER A. McDOWELL, GEORGE C. NEWMAN, TRUSTEE, THOS. RYAN, JOHN S. GREGORY, AND E. MARY GREGORY, APPELLANTS.**

1. **Estoppel: JUDGMENT: RES ADJUDICATA.** In order to constitute a former adjudication which can be pleaded in bar of a recovery, the judgment pleaded must be in an action between the same parties, or their privies, and upon the same subject-matter as the cause in which the defense is presented.
2. **Attorney and Client: PRIVILEGED COMMUNICATIONS: EVIDENCE.** Where an attorney is employed to prosecute an action to foreclose a mortgage, and before the final foreclosure is consummated, and during the litigation, the plaintiff denies the authority of his attorney to prosecute a collateral action which, if prosecuted, would work an estoppel on plaintiff; and where in a subsequent action in which the question of the authority of the attorney to act becomes important, for the purpose of determining the rights of parties affected by the first decree, it is not a violation of the law of privileged communications to allow the attorney to testify as to his employment, and as to the instructions given him by his client, or as to his approval of the course pursued by the attorney. Especially is this the case where the relation of attorney and client has ceased and the authority of the attorney is called in question by the client, and in a case where equities of third parties are to be settled without detriment to the rights of the client.

3. **Mortgage: FORECLOSURE: NEW MORTGAGE: PRIORITY OF LIENS.** A executed a mortgage to B on certain lands to secure the payment of a sum of money. Afterwards, and during the existence of the lien created by the mortgage, A, upon the conditional consent of B (the condition being that the new security should be of equal value with the old), exchanged part of the real estate mortgaged for other real estate of less value, receiving the difference in cash, and executed a new mortgage on the property received by him in exchange for that previously mortgaged, receiving a release, which he failed to have recorded, and conveying the land described in the first mortgage to the purchaser. B was a non-resident. The mortgage was placed in the hands of attorneys for foreclosure who had no knowledge of the execution of the second mortgage, nor of the release of the part of the property described in the first mortgage. They obtained a decree of foreclosure against the property described in the first mortgage. Service of summons upon the owner of the property released was had by publication. By mistake of the attorneys this released property was not described in the published notice. After the decree had been rendered the attorneys brought suit to correct the decree and modify it so as to omit the released premises and include that described in A's second mortgage. In this proceeding the purchaser from A made a general appearance. The decree was modified as prayed. A appealed to the supreme court, where the action was dismissed on the motion of B, as having been instituted and carried on without his authority. B had knowledge of the existence of the second action, and did not disaffirm until informed of all the facts. While this second suit was pending B's attorneys purchased of A's grantee the property released from the first mortgage at about one-eighth of its value, and had the deed made to another in trust for them. Soon afterwards they sold the land for its value and retained the proceeds, the purchaser having constructive knowledge of all the proceedings. In an action by this purchaser to enjoin the sale of the land under the decree, and for the purpose of having the real estate of A included in the second mortgage sold first, it was *Held*, That as between such purchaser and A he was entitled to have the property conveyed by A's second mortgage sold first, but that after such sale, if any deficiency existed, the land purchased by him should be sold to satisfy the same.

APPEAL from the district court of Lancaster county.  
Heard below before POUND and MITCHELL, JJ.

*Brown & Ryan Brothers*, for appellant McDowell, cited: *People v. Atkinson*, 40 Cal., 285. *Dedric v. Hopson*, 62 Iowa, 562. *Bacon v. Frisbie*, 80 N. Y., 401. *Chirac v. Reinicker*, 11 Wheat., 280. *Case v. Carroll*, 35 N. Y., 385. *Henry v. Raiman*, 25 Penn. St., 354. *Hatch v. Fogerty*, 40 How. Pr., 492.

*John S. Gregory*, *pro se*, and for E. Mary Gregory, appellant.

*J. R. Webster*, for appellee, cited: *Cheney v. Cooper*, 14 Neb., 418. *Week's Attorneys*, § 177. *Rochester Bank v. Suydam*, 5 How. Pr., 254. *Mitchell v. Bromberger*, 2 Nev., 345.

REESE, J.

This is an appeal from a decree of the district court of Lancaster county. The cause was referred to a referee, who heard the evidence and reported his findings of fact and conclusions of law, and which report was confirmed and decree entered in accordance therewith over the exceptions and objections of defendants. The record is unusually voluminous, and the report of the referee is of great length, and we shall be content with a brief statement of the case without quoting at length from either.

The briefs and arguments at the bar of this court abound with charges and counter-charges of dishonesty and bad faith on the part of counsel and litigants; and, while there is much in the case from its inception which savors of a want of good faith and common honesty, we shall neither deem it a duty nor a privilege to apologize for, explain away, condemn, or criticise the conduct of any one involved in this case, but seek to dispose of the cause, as it seems to demand, in a rather summary way, and thus, if possible, terminate its long and expensive career.

In 1875 defendants John S. and E. Mary Gregory executed to defendant McDowell their note for the sum of \$1,000, and to secure its payment made a trust deed or mortgage to defendant Newman. This mortgage covered the south-west quarter of section 20, in township 12 north, of range 6, and the east half of the south-east quarter of section 27, in township 10 north, of range six. About one year thereafter Gregory negotiated an exchange of property with one Powell, by which he was to receive from Powell lot 7 in block 122 in the city of Lincoln, and for which he was to give the eighty acre tract in section 27, and which was included in the McDowell mortgage. McDowell was a non-resident, residing in New York, and his business was transacted here by Hartley, Newman, and Leonard, who were connected with the Lancaster County Bank, in Lincoln. It further appears that the land was considered worth \$800 more than the town property. Such representations were made to McDowell as to the benefits to be derived from an exchange of securities as induced him to consent, conditionally, to the exchange. This condition was that the title to the new security should be good, and the value equal to the old. The exchange was made, but the \$800 received was not accounted for, McDowell receiving no part of it. The new mortgage was sent to McDowell, and the time of payment by his consent extended for one year. Gregory, by this deal, received the \$800 and the city property for the eighty acres, the land in dispute here. He failed to record the release of the mortgage and also failed to pay his note. The mortgage was placed in the hands of Lamb, Billingsley & Lambertson for foreclosure. Lambertson appears to have had little, if anything, to do personally with the matter. The suit was instituted, but for the foreclosure of the original mortgage. The attorneys claim they had no knowledge of the exchange of securities, and it seems that the mortgage on the city property was not placed in their hands. Powell was made

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Brigham v. McDowell.

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a party to the action. Being a non-resident, service of summons was made by publication. No mention was made of the eighty acre tract either in the affidavit for publication or in the notice as published. The 160 acres in section twenty was described in both, and referred to as the property described in the mortgage. During the pendency of this suit, with the consent of McDowell, it was stipulated that a decree should be entered as prayed, that no stay of proceedings should be had by Gregory, that no attorney's fees should be taxed in the costs, an order of sale should be issued and the land sold, but no judgment for any deficiency should be entered against Gregory. The decree was entered, and in due time the order of sale was issued and the land in question here was advertised for sale. The attorneys having the matter in charge ordered a return of the order of sale. An action was afterwards commenced, the purpose of which was to correct the former decree so as to relieve the eighty acres from its effects and in its stead include the city property described in the second mortgage. This suit was commenced in September, 1878. In December, 1879, and while this suit was pending, Lamb and Billingsley, who were still the attorneys for plaintiff, and J. H. McMurtry purchased the eighty acres for the sum of \$250, and caused it to be conveyed to Harry E. Wells, who held it in trust for them. At this time Lamb, Billingsley, and McMurtry all knew that McDowell claimed an interest in the land and insisted that the conditions imposed had not been complied with and that he had never released it from the mortgage. On the 10th day of February, 1880, and while said suit to correct the decree was still pending, Wells conveyed the land to E. S. Hume, a sister of Billingsley, and she received and held the title in the same capacity in which Wells had held it—as trustee for Lamb, Billingsley, and McMurtry. A decree was finally entered correcting the former deed as prayed. Powell appeared in this cause and filed a general demurrer, but so far as is

shown, no ruling was had thereon. From this decree Gregory appealed to the supreme court, but the cause was dismissed without a hearing on the merits, McDowell having appeared and denied the authority of Lamb and Billingsley to prosecute the suit. The action was, upon his motion, dismissed. See *McDowell v. Gregory*, 14 Neb., 33. In 1883 Powell and the plaintiff in this suit appeared in the district court and each filed motions to set aside the decree and for leave to answer under the provisions of section 82, civil code. But Powell having no interest in the property at the time of filing his motion, and Brigham (plaintiff) not having been a party to the action and having received his title after the decree, both applications were refused and this holding was affirmed in *Powell and Brigham v. McDowell*, 16 Neb., 424. This action is now brought by Brigham to restrain McDowell from selling the eighty acres referred to and to which he holds title, or failing in that to require the property in the city of Lincoln on which Gregory executed the last mortgage to be sold first, and that this land may be held only for such deficiency as may exist after such sale. The referee by his findings of fact and conclusions of law decided that the eighty acres owned by plaintiff was discharged from the mortgage, and that the temporary injunction should be made perpetual, and that McDowell was entitled to a decree foreclosing the mortgage executed by Gregory on lot 7 in block 122, in the city of Lincoln, and that said property should be sold to satisfy the unpaid balance of the original decree, which was found to be \$1,496.95. A decree was entered accordingly. Defendants and Gregory appeal.

A number of questions are presented for decision by the appellants, some of which we will notice in the order in which they occur. It is insisted that there has been a full and final adjudication of all questions involved in this suit by the judgments in the cases reported in 14th and 16th Neb. above referred to. We cannot so hold. The first



case was dismissed by the supreme court upon the uncontradicted showing of the plaintiff McDowell that the action was brought without his knowledge or consent. That he had not released the land, and that his attorneys, prior to the commencement of the action had purchased it for \$250, although it was worth \$2,000, and had caused it to be conveyed to a sister of one of said attorneys to be held in trust for them, etc. The action was simply dismissed without a final hearing, and the parties were restored to their former condition. Nothing could have been adjudicated there except the fact that as between the parties to the record the suit was instituted without authority. As to the second action, reported in 16 Neb., the only question there settled was that neither Powell nor Brigham was in a position which would entitle him to the benefits of the provisions of section 82 of the civil code. In order to constitute an adjudication of the questions involved in this action the judgments pleaded must have been between the same parties (or their privies) in an adversary proceeding, and a judgment must have been entered upon the merits or upon the questions presented in this action.

It is insisted that plaintiff has an adequate remedy at law, and is therefore not entitled to an injunction at all. That if his title fails his recourse should be had upon the covenants of his deed. As between plaintiff and McDowell alone this might be true, but as all parties interested are before the court it was proper for the referee to consider all the equities of the case and decide as to the rights of all. As we shall see further on it is clear that as between Brigham and Gregory the equities are with the former and the decree should be entered accordingly. Sec. 429, civil code.

Our attention is called to the evidence, and in this connection it is claimed that the referee erred in admitting the testimony of W. J. Lamb, who was the attorney for defendant McDowell in the suit for the foreclosure of the

mortgage. This testimony related to the correspondence and communications made between McDowell and Lamb during the progress of the litigation and while the relations of attorney and client subsisted. It is claimed that these communications were privileged under the provisions of section 333 of the civil code, and the well-known principles of the common law by which professional communications are protected in order that the freest and most confidential relations may safely exist between attorney and client. This rule of law is too well settled to require any discussion or examination here, and it need only be said that we adhere to it in all of its force and its proper application. But as we have seen, the contest here is not solely between plaintiff and defendant McDowell, but is also between plaintiff and defendant Gregory. If the mortgage on the eighty acres in question was released by McDowell, that is, if the conditions imposed by him and known to Gregory had been fully met and complied with, or if Gregory had no knowledge of any such failure and had received the unconditional release of the mortgaged property and transferred it to a *bona fide* purchaser in good faith, and all the *mesne* conveyances to plaintiff had been in good faith and without notice, it can be easily seen that plaintiff's equities would be much greater than Gregory's. In fact it cannot be well doubted that as between plaintiff and Gregory, plaintiff would be entitled to protection. Since McDowell by his effort to sell must be taken as in a hostile attitude to plaintiff, it becomes an essential and pertinent enquiry as to whether he had either approved the release at the time it was made as being in compliance with the conditions imposed, or whether he had ratified it afterwards by knowingly authorizing Lamb as his attorney to reform the decree when the alleged mistake was discovered. As between plaintiff and defendant McDowell, we cannot see that the decision of the referee was a violation of the rule invoked by plaintiff. As we

view the case it must be treated substantially as if the deed from Campbell to Wells had been made directly to Lamb and Billingsley, who then were plaintiff's attorneys. The good faith of this transaction, or whether or not they could have been called upon by plaintiff for an accounting or not, or whether the purchase of the property was a violation of professional ethics, is not directly before us and need not be here discussed. Lamb and Billingsley were, in equity and good conscience at least, liable to plaintiff for the consideration paid them for the land in case of a failure of his title. To this extent the relations of McDowell and Lamb and Billingsley were adversary. The real question was one of authority on the part of Lamb and Billingsley to pursue the course adopted by them in conducting McDowell's suit. If McDowell, with full knowledge of all the facts in the case, had instructed them to abandon the mortgage as to the eighty acres and foreclose as to the city property in its stead, the authority and direction would not be a privileged communication. *Gower v. Emery*, 18 Me., 79. *Brown v. Payson*, 6 N.H., 443. *Fulton v. Macocrucken*, 18 Md., 528. *Heister v. Davis*, 3 Yeates, 4. *Rochester Bank v. Suydam*, 5 Howard Pr., 254. *Burnside v. Terry*, 51 Ga., 186. *Nanve v. Baird*, 12 Ind., 318. *Satterlee v. Bliss*, 36 Cal., 489. *Mitchell v. Bromberger*, 2 Nev., 345. Again, suppose it were true, and which must be assumed to be the case until the contrary appears, that the title of plaintiff was not tainted by any want of good faith in his grantors, and that McDowell with full knowledge of the facts had approved the relinquishment of the mortgage, and based upon such approval the plaintiff's title had been acquired, it would be an infringement of all rules of right to say that after such voluntary act on the part of McDowell he might take advantage of the confidence reposed in his acts by the purchaser and by closing the mouth of his attorney as to his authority perpetrate a fraud upon those who had relied upon his conduct and that of his attorney. The rule

applicable to privileged and professional communications is intended for a shield to protect the confidence of a client reposed in his attorney, and not as an implement by the use of which he can defraud others. Taking all the circumstances of the case, as well as the relations of the parties to the suit, into consideration, we think the referee did not err in hearing the testimony of Mr. Lamb.

By the testimony and report of the referee we are informed that Gregory first mortgaged the land in question to defendant McDowell. Afterwards he succeeded in getting the city property substituted as security in lieu of the land, receiving a written release from the trustee. He failed to place this release on record. In securing the release he made an exchange of property by which he traded the mortgaged land for that which he mortgaged in its stead. He not only received the city property for the land, but also the sum of \$800 in cash. He now asks that, notwithstanding the fact that he has once received full value for the land, it be still sold under the mortgage and the property received in its stead and mortgaged in its stead shall be protected from sale. We know of no rule either of law or equity which would enable him to do this. As between him and plaintiff the equities are all one way, and this without reference to the presence or want of good faith in Lamb and Billingsley or any other person in afterwards purchasing the land. The decision of the referee that the city property mortgaged by him in lieu of the land should be sold was right.

The next question is as to whether the decision of the referee that the temporary injunction by which defendant McDowell was restrained from selling the eighty acres first mortgaged by Gregory should be made perpetual was right. In order to a full understanding of the question we quote the 31st, 32d, 33d, 34th, 35th, and 36th findings of the referee, to-wit:

"31. I find about the 7th of September, 1878, the so-

called second suit was instituted in the name of Peter A. McDowell against the defendant Gregory *et al.*, in which it was alleged, in substance, among other things, the making, executing, and delivering of the note and trust deed as herein referred to, and the execution of the second trust deed herein named, and in which it was alleged that the said eighty acre tract had been, by arrangements made in 1876, released therefrom by Peter A. McDowell, at the instance and request of the Gregorys, and the lots named in the second trust deed taken in lieu of the eighty acres, that the Gregorys had fraudulently retained the said release in their possession and not placed the same on record, and they had concealed the fact of such alleged release from the knowledge of the said Peter A. McDowell's attorneys, and that the said stipulation upon which the decree in the first mentioned suit had been obtained, was obtained through fraud and misrepresentation practiced upon said McDowell's attorneys, and in which it was further alleged that the debt was still in full force and unsatisfied, and that such facts had not been discovered by McDowell or his attorneys until after the rendition of the decree in the above mentioned suit. A prayer of this petition, in substance, was that the first named decree should be vacated as to the eighty acres, and that the decree of the foreclosure should be made, which should include in its terms 160 acres of land and lot 7 in block 122. A more particular statement of the allegation of which will be found in the petition, which is a part of the bill of exceptions herein.

"32. I find that on the 16th of December, 1878, Martin L. Powell entered appearance in said action, and on May 24, 1879, he filed in said action his general demurrer to the said petition therein filed, which demurrer was never ruled upon; that on October 10, 1879, Powell had leave to plead in said action, and that said Powell made no further appearance in said court.

"33. That on the 16th day of December, 1879, pending

a prosecution of the said action, the said Campbell and her husband conveyed the said eighty acres of land to one Harry E. Wells, the consideration expressed in said deed being the sum of \$250. That said Wells was a mere dry trustee, the beneficiary of the trust being Walter J. Lamb, Billingsley, and McMurtry, the said Lamb and Billingsley being two of the attorneys of the said McDowell in the said foreclosure proceedings.

"34. I find that prior to the said conveyance to the said Wells, and ever since about the 19th of April, 1878, the said Lamb and Billingsley, as McDowell's attorneys, and who were two real purchasers under said last named deed, had notice from McDowell that McDowell claimed and insisted that he had never released said eighty acres except conditionally, that is, upon the conditions as shown in the finding above named, referring to the letter of said McDowell of April 19, 1878, and that their purchase was with actual notice of McDowell's claim as there made.

"35. I find that in December, 1878, said McDowell, with Bowers H. Leonard, was in Lincoln, Nebraska, and at the time had an interview with Walter J. Lamb, and that at that time said Lamb told McDowell that he had commenced or would commence an action to have the house and lot substituted as security for the eighty.

"36. I find that on the 10th day of February, 1880, the said H. E. Wells conveyed the said eighty acre tract to E. S. Hume, a sister of L. W. Billingsley, who was merely a dry trustee holding title for the benefit of said Lamb, Billingsley, and McMurtry, which conveyance was made pending the prosecution of the said second suit."

By these findings it appears that while the decree was in existence by which the land in question was declared subject to the lien of the mortgage, and its sale ordered, and while Lamb and Billingsley were McDowell's attorneys, they, with McMurtry, purchased the land for much less than its value and caused the title to be conveyed to

another as their trustee. It cannot be questioned that the remarkably low price for which the land was purchased was owing to the existence of the decree against it procured by them. It would seem, also, that the necessity for a trustee bore some relation to that fact, and to this we might add the conveyances from one trustee to another. The action to substitute the city property for the land was pending, and this was also under their direction, although in the name of another attorney. Powell appeared in this second action. The question of the original jurisdiction of the court over the land, by reason of the omission of Lamb and Billingsley to include this land in the notice, now becomes wholly unimportant. It cannot be of any avail to Lamb and Billingsley, or any one purchasing from them with either actual or constructive notice of the proceedings. The decree stands to-day unchanged, the decree of the district court ordering the substitution of the property having been reversed in *McDowell v. Gregory, supra*. Neither Lamb and Billingsley nor their grantees with notice can acquire any rights in the land as against McDowell. The profit so quickly made by Lamb and Billingsley should have inured to the benefit of their client, but it seems it did not. The land was under the decree when they sold it. They knew this, and of course warranted against it, not only by the conveyance of their trustee, but also by their representations as to the condition of the title when certifying to the abstract. While it appears that McDowell had knowledge of the proceedings to change the decree, it also appears that when he ascertained all the facts he disaffirmed the action of his attorneys, and upon his motion and showing the cause was dismissed and the decree as originally entered allowed to stand. An opportunity was offered to his attorneys, when their authority was questioned, to sustain their action, but they saw proper not to do so. As between McDowell and plaintiff, it is clear that the land should be liable to be sold to satisfy the decree.

Hooper v. Browning.

The decree of the district court must therefore be modified to the extent that in case a deficiency remains after the sale of said lot 7 in block 122, then an order of sale will issue for the sale of the land here in question to satisfy the same.

DECREE ACCORDINGLY.

THE other judges concur.

19	420
19	721
19	420
30	39
32	344
19	420
39	667
19	420
51	202

E. H. HOOPER AND JOHN CURTIN, PLAINTIFFS IN ERROR, v. J. D. BROWNING, DEFENDANT IN ERROR.

1. **Verdict Sustained.** For reasons set out at length in the opinion, *Held*, That there was evidence before the jury to sustain their verdict.
2. **Witnesses: IMPEACHMENT.** Before a witness can be contradicted by showing by the oath of another witness that he has made statements out of court inconsistent with his testimony, he must be interrogated as to whether he has made such statements, and his attention called to the time and place of making them, and to whom made.
3. **Evidence: ADMISSIONS.** The statements or admissions of a party to a suit can be proved against him only when such statements or admissions are so connected with the main transactions involved in the litigation as to be material to the issue or issues in the case.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

*S. N. Lindley* and *W. O. Hambel*, for plaintiffs in error.

*B. S. Baker* and *W. H. Snell*, for defendant in error.

CORB, J.

The action in the court below was replevin, brought by Josiah D. Browning against E. W. Hooper and John Cur-



tin for the possession of a certain note, described in the petition as "one promissory note of six hundred dollars, dated July 19, 1881, signed by Jane E. Coburn, payable to the order of J. D. Browning, of the value of six hundred dollars." The case seems to have been originally brought and tried in the county court, but with what result does not appear from the record. It was appealed to the district court, where there was a trial to a jury, with a verdict and judgment for the plaintiff. The defendants bring the cause to this court on error. There are several errors assigned, all but one of which are as to the sufficiency of the evidence to sustain the verdict. The fourth assignment is, "That the court erred in excluding the testimony of A. H. Moulton."

The plaintiff, on the trial below, testified as a witness on his own behalf to the effect that after taking the note in litigation from the maker he went to St. Joseph, Mo., to live, and had the note with him, it not being due. I quote from his testimony: "After that there was a lady that had frequently asked me to loan her money. I think it was two or three months that she was after me for money. Eventually I agreed to let her have five hundred dollars, on certain conditions, and I let her have it. The day was set when she was to come to the State Savings Bank and get the money. I let her have it, and she gave me the agreement that the five hundred dollars was to be paid to the State Savings Bank by her, and she signed an agreement as strong as I could make it. I signed the note and gave it into the bank. About the time it became due she paid it off and returned the note to me, and said she had paid it off. I said, Where is the five hundred dollar note? She had a little portemonnaie, and looked for it, and said she didn't have it; and I said, I must have that; and she said she would get it for me the next evening or the next morning, and I kept after her for it; and I told her, eventually, 'If you don't get me that paper I will sue you.'

I didn't get it, and I commenced a suit against her. Finally she returned with a Coburn note (*sic*), and I put it in a washstand drawer, where I kept papers; it was not used for a washstand. That paper, the agreement, and my note, and other papers I could not find. Other papers were gone, also. That is about all there is to that that I remember now. I tried for over two years, and sought every opportunity to get it, but never could get it."

Q. State what you have done about it?

A. I tried every way that I could. Eventually, Messrs. Reed & Hall, a firm in the real estate business, said they had it; they are a firm in St. Joseph.

Q. What conversation did you ever have with Reed & Hall about it?

A. I told them I had lost such a note, and that I did not know what had become of it; and I asked both of them if they had heard of such a note, and, if they did, if they would let me know of it, and they said they would.

Q. Who were Reed & Hall acting for?

A. I think they were acting for Mrs. Noble.

Q. Who had access to that stand drawer?

A. The lady that was my wife at that time.

Q. She is not your wife now?

A. No, sir.

Q. She is divorced from you now?

A. Yes, sir.

Q. What was done?

A. I tried a great many times to get it; one time I telegraphed to Colonel Harbine's bank if such a note had ever been sent there for collection.

Q. Did you come up here?

A. Yes, sir.

Q. Did you try to get the note?

A. Yes, sir.

Q. What become of the note?

A. On one occasion Mr. Monroe said he had returned it to the State Savings Bank.

Q. What did you do then?

A. I went back.

Q. Did you succeed in obtaining a knowledge of its whereabouts?

A. Yes, sir; I telegraphed to Harbine, but did not succeed in getting my note, and returned to St. Joseph.

Q. Did you come here on purpose for that note?

A. Yes, sir, I did.

Q. What did Mrs. Noble ever tell you, if anything, in reference to this note?

A. She talked to me at various times; I don't know as I can remember what she said each time. She promised to return the five hundred dollar note, but she didn't do it, and I brought suit for it, but my attorney told me it was best to wait until the note became due, and replevy it; and that is the way I did.

Q. Did you ever have any conversation with Mrs. Noble in regard to this collateral note after you lost it?

A. Yes, sir, I did.

Q. What did she say?

A. She said she did not have it.

Q. From what source did you first learn that Curtin had it?

A. When they were taking depositions, and Reed & Hall were taking them; and I went over to St. Joseph, and that was the first. When I replevied the note here, that gentleman that I took it from was an entire stranger to me—Mr. Hooper, he said his name was. I came into town, and there was a man here that had my note; I asked some gentlemen if they knew him, and one of them did; and he showed me the note, and I asked him where he got that note; and he said "I found it on the prairie, near Belvidere;" and he said it looked as though it had lain there two or three days; and I said, "I had not been at Belvidere, and did not know who had left it there."

Q. Did you ever go to the State Savings Bank at Saint Joseph?

A. Yes, sir; when I had been out here trying to find it, I went straight to the State Savings Bank and I asked them for it—if it had been returned there, and they said it had not; and I said, “There must be a mistake somewhere;” and I took out a letter from Mr. Exton, and showed him this letter; and he waited a few minutes, and he said “Reed & Hall have got your note;” and I saw Mr. Reed on the sidewalk, and I asked him who had it, and he said he did not know; and I said, “You have it;” and he said no, that they had not got it, but that a young man that was going to school here has got the note; and after that they owned that they had it.

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Q. Who purchased that note from Mrs. Noble?

A. Reed & Hall say they did.

Q. For whom?

A. For John Curtin.

Q. Did they, previous to this time, know, and had they been informed of the condition under which it had been given?

A. Yes, sir; I talked with them both several times about my loss of the note, and they always denied knowing anything about it at all. Some time after Mr. France told me they had it, they owned it up.

Q. Did you tell them that it was your note, and the circumstances under which it was left at the bank?

A. Yes; I told them that it was stolen from me; I told them that all the time.

Q. What is the value of this Coburn note?

A. Six hundred dollars, the principal.

Q. And the other?

A. Five hundred dollars.

The plaintiff was cross-examined at considerable length; the only effect was to cause him to still further confuse his statement made in his examination-in-chief as to the papers which Mrs. Noble returned to him that he put in the stand

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Hooper v. Browning.

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drawer, and which were afterwards stolen from him. He also stated that at the time of the service of the order of replevin on the defendant Hooper the two notes were attached together.

The testimony of C. B. France, president of the State Saving Bank of St. Joseph, whose deposition was taken and read upon the part of the defense, is scarcely inconsistent with the testimony of the plaintiff as to the loan of the five hundred dollars by plaintiff from the bank, the execution and delivery of the plaintiff's personal note therefor, and the pledging of the six hundred dollar note of Mrs. Coburn as collateral security for the payment of the same. He did not know Mrs. Noble in connection with the transaction. Says the money was not paid to her at the time, but, on the contrary, said that it was paid to Poin-dexter & Miller. He does not disclose his source of knowledge as to what disposition Browning made of the money, and it is quite obvious from his whole testimony that his statement in that respect was made on hearsay. His testimony leaves no doubt that the amount of the face and interest of Browning's note was paid into the bank by Mrs. Noble, and that witness as president of the bank assigned the note, and delivered both it and the six hundred dollar collateral note to her. That whether witness at the time considered it a payment of the note and release of the collateral on the purchase by Mrs. Noble of the principal and collateral notes, is by no means certain. He several times in his testimony speaks of the note having been paid. On cross-examination, in answer to the question: "Do you know how she came to pay it off?" he answered: "I don't know; she did pay it off, and took a transfer of it." This witness does not state, nor is he asked, whether the two notes were attached together at the time of their delivery to Mrs. Noble, or not. I mention this for the reason that if the notes were separate then there was no indorsement of the collateral note, and it being by its terms payable to J. D. Browning or

order the absence of an indorsement was a *caveat* to all the world. If they were attached, the five hundred dollar note might be regarded as an *elongment* of the other, and Browning's signature on the back of it regarded as an indorsement.

The testimony of the plaintiff is contradicted as to material facts by Catherine Noble and James M. Poindexter, witnesses for the defendants, whose depositions were read on the trial, and were it a question of the weight of evidence and of probabilities which we have to consider, I could scarcely agree with the jury in their conclusions; but these were considerations for the jury. Indeed I might say that were it not for the occasional recurrence of cases much like the one at bar, the use of juries in civil cases could scarcely be justified.

I think that there was sufficient evidence before the jury to have sustained a finding that the note was stolen from the plaintiff. It must be admitted that even if it was stolen, if it was endorsed in blank by the payee, and was passed before maturity to a *bona fide* holder for value, who received it without notice, in the usual course of business, such holder could defend its possession as against the payee. In such case, however, the burden of proof is upon the holder to show that he falls within the above terms. Dennis Curtin deposed on the part of the defendants that the defendant, John Curtin, had funds in the hands of Reed & Hall for investment, and that they bought the said note with such funds. He was not asked and probably knew nothing as to Reed & Hall's knowledge or notice of the history of the note before it came to their hands. They, and the person of whom they received the note, are probably the only persons who know the truth or falsity of the facts necessary to make them, or their *cestui que trust*, the *bona fide* holders of the note. Neither of them were called as a witness, and, although Mrs. Noble, the person who testified that she sold them the note, had her deposition

twice taken, she was not asked nor did she testify to any fact bearing upon the good faith in which they received or of the consideration which they paid for the note.

I conclude, therefore, that there is evidence to sustain the verdict of the jury.

At the trial the defendants called judge H. H. Moulton as a witness in their behalf, who, after having testified that there had been a trial of said cause before him (I presume in his capacity of county judge), the following question was asked him by counsel for defendants :

Q. State what Mr. Browning said at that trial as to the object for which the money was borrowed?

The plaintiff objected to the question for the reason that it is immaterial, irrelevant, incompetent, and that no proper foundation had been laid for its introduction ; which objection was sustained, and the answer excluded.

Also the following :

Q. State whether or not he swore on the trial of this cause in your court, that this money was borrowed to pay a debt that his wife owed to Mrs. —?

The same objection by the plaintiff, and the same ruling by the court.

Q. State whether or not Mr. Browning told you, or swore at that time, that this Mrs. Noble was worth about eighty thousand dollars. What did he say at that time as to her pecuniary standing?

The same objection, by the plaintiff, and the same ruling by the court.

These rulings and the exclusion of the testimony sought to be elicited by the above questions are assigned as error.

The object of these questions was to contradict the plaintiff's statements made on the stand in court, by proving by this witness that he had made inconsistent statements as to these facts out of court. It is, I think, a rule of universal application that before such testimony can be introduced over objection, the witness whom it is sought to contradict

must first be questioned as to whether he has made such statements, calling his attention to the time and place at which, and the person or persons to whom such statements were made, as near as may be. Then, if the witness deny having made the statement, out of court, and such statement is of a fact or facts material to the issue or issues involved in the case, the witness may be contradicted, and witnesses for that purpose may be called and examined. But if the statement is not of a fact material to the issue, the cross-examining party is bound by the answer of the witness, and cannot call or examine another witness for the purpose of proving that he has made contradictory statements out of court. This rule is deemed to be so well settled and universally understood and conceded that no authority need be cited to sustain it.

Counsel insist, however, that even if Browning as a witness might not have been contradicted, Browning as a party to the suit might. This I must confess presents a very different question. Were the statements which it is alleged the plaintiff made to or before the witness connected with the main transaction involved in the litigation, so as to appear to the court to be in the nature of a confession or admission of a material fact in the case, then, doubtless, such statements or admissions might be proved by any witness knowing the facts on the part of the defendant. See *Stephens v. Vroman*, 16 N. Y., 381. The difficulty here is, that the alleged statements of Browning sought to be proved by the witness Moulton were of matters not logically necessary to the existence of any material fact in the case, and but very remotely, if at all, connected therewith. The ownership and right of possession of the note in the plaintiff does not logically depend in any degree upon the purpose or object for which plaintiff borrowed the five hundred dollars from the State Savings Bank; and less still upon the number of thousands of dollars which Mrs. Noble was worth. It is clear, therefore,



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Ward v. Lavery.

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that Browning's statements in respect to these matters made out of court, or in the county court, could not be proved as the admissions of a party to the suit against his interest. We have already seen that they were not admissible for the purpose of impeaching the party as a witness without first laying the proper foundation.

The judgment of the district court is therefore affirmed.

**AFFIRMED.**

THE other judges concur.

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**SARAH J. WARD, APPELLANT, V. ALEXANDER LAVERTY  
ET AL., APPELLEES.**

19	429
20	232
21	571
19	429
22	612
19	429
40	208

1. **Infant: MARRIAGE DURING NONAGE.** Where a female marries while under sixteen years of age, and continues to cohabit with her husband after arriving at that age, her minority ends, and she is legally qualified to convey her real estate by deed.
2. ———: **DISAFFIRMANCE OF DEED.** A minor who has conveyed his real estate must disaffirm the deed within a reasonable time after coming of age or be barred of that right.

**APPEAL** from the district court of Seward county. Heard below before NORVAL, J.

*Samuel J. Tuttle*, for appellant, cited: *Prout v. Wiley*, 28 Mich., 167. *Irvine v. Irvine*, 9 Wall., 617.

*Leese Bros.*, for appellees Foresmans and Cattle, cited: 1 Broom & Hadley's Com., § 524, and cases cited. *Bingham on Infancy*, 65. *Jones v. Jones*, 46 Iowa, 466. *Prout v. Wiley*, 28 Mich., 164. *Wamsley v. Crook*, 3 Neb., 352.

**MAXWELL, CH. J.**

In May, 1873, the plaintiff, being then about fourteen years of age, was married to J. G. Ward, and they have

lived together continuously from that time until the present as husband and wife. In February, 1876, she, as the minor heir of Abigail Henderson, deceased, became vested by a patent from the United States of the title to the east half of the south-west quarter of section twenty-four, township twelve, range three, in Seward county, and in January, 1877, while living on said land with her husband, she sold and conveyed the same to one Lavery, who conveyed to one Whitney, who was in possession when this action was commenced. On the trial of the cause the court found: "That plaintiff, on the 16th day of May, 1873, was married to J. G. Ward, and continuously from thence hitherto they have lived together as husband and wife; and that said Sarah J. Ward, on the 20th day of January, 1877, being at that time more than seventeen years old, and at the time residing on said real estate with her husband, for a fair and valuable consideration sold and conveyed said real estate to the defendant Lavery, her said husband joining with her in said conveyance; that thereafter plaintiff, with her husband, resided on said real estate as the tenants of said Lavery, and after the said plaintiff had arrived at the age of eighteen years, she, with her husband, vacated said real estate, and turned the possession thereof over to the said Lavery."

The court rendered judgment in favor of the defendants, and dismissed the action. The plaintiff appeals.

This action was brought October 15th, 1881. Two questions are presented: 1st. The authority of the plaintiff to execute the deed to Lavery; and 2d. Her right to disaffirm the conveyance when she became eighteen years of age.

Sec. 1, chap. 52, Comp. Statutes, provides that, "in law marriage is considered a civil contract, to which the consent of parties capable of contracting is essential."

Sec. 2. "At the time of marriage the male must be of the age of eighteen years or upwards, and the female of the age of sixteen years or upwards."

Sec. 1, chapter 34, provides that, "all male children under twenty-one, and all females under eighteen years of age, are declared to be minors; but in case the female marries between the age of sixteen and eighteen, her minority ends."

Sec. 33, chapter 25, provides that, "a petition to annul a marriage on the ground that one of the parties was under the age of legal consent, may be exhibited by the parent or guardian entitled to the custody of such minor, but in no case shall such marriage be annulled on the application of a party who was of the age of legal consent at the time of the marriage, nor when it appears that the parties, after they had attained the age of consent, had freely cohabited as man and wife."

Sec. 2, chapter 58, provides that, "a married woman, while the marriage relation subsists, may bargain, sell; and convey her real and personal property, and enter into a contract with reference to the same in the same manner and to the same extent and with like effect as a married man may in relation to his real and personal property."

Sec. 42, chapter 73, provides that, "any real estate belonging to a married woman may be managed, controlled, leased, devised, or conveyed by her, by deed or by will, in the same manner and with like effect as if she were single."

It will be seen that the statute declares that in case the female marries between the age of sixteen and eighteen years her minority ends. The same result will follow if she marries while under sixteen years of age and continues to live with her husband until after she is sixteen years of age. The marriage of a female under sixteen years of age is not void, but voidable only at her election at any time before she arrives at the age of legal consent. If the parties separate during such nonage, and do not cohabit together afterwards, the marriage is voidable. Sec. 2, chap. 25, Comp. St., provides that, "If, however, the parties continue to live together as husband and wife after the

parties arrive at the age of legal consent, it is an affirmance of the marriage and it can thereafter be dissolved only for some of the causes which entitle the parties to a divorce."

It is claimed by the appellant, that sec. 1, chap. 34, Comp. Stat., that if a "female marries between the age of sixteen and eighteen her minority ends," applies alone to such females as marry while they are between sixteen and eighteen years of age. This, certainly, would be a very narrow construction to give the statute. In no case can it be said that a marriage which has taken place while the female was under sixteen years of age is beyond the power of revocation until she has arrived at the age of sixteen and has affirmed it by continued cohabitation with her husband. It is then a perfect marriage and beyond the power of the parties to revoke the same because of nonage. The marriage being affirmed, the wife ceases to be a minor, and may enter into contracts in relation to her separate estate in the same manner as her husband. • The deed in this case, therefore, being executed when the wife was about seventeen years of age, is valid and binding upon her.

2d. But even if the plaintiff had been a minor when this conveyance was made, still the record shows that she accepted a lease from Lavery and continued to reside on said premises until after she was eighteen years of age, when, with her husband, she voluntarily surrendered possession to her grantee, and there is no evidence that she attempted to disaffirm her deed until she brought this action.

While there is some conflict in the authorities as to the length of time within which a minor after coming of age may disaffirm a contract, we think the better rule is, that it must be within a reasonable time. *Jenkins v. Jenkins*, 12 Iowa, 195. *Wright v. Germain*, 21 Id., 585. *Jones v. Jones*, 48 Id., 466. *Green v. Wilding*, 59 Id., 679.

In *Goodnow v. Empire Lumber Co.*, 31 Minn., 468, the supreme court of Minnesota held that a minor who ex-

Hansen v. Berthelsen.

ecutes a conveyance of real estate must disaffirm it within a reasonable time after he comes of age or be barred of the right to do so. The opinion contains a very full citation of authorities both for and against the proposition and the subject is ably discussed. It is said, "the right of a minor to disaffirm on coming of age, like the right to disaffirm in any other case, should be exercised with some regard to the rights of others—with as much regard to those rights as is fairly consistent with due protection to the rights of the minor." This, we think, is a fair statement of the law. In a number of the cases cited it was held three years was not within a reasonable time, and we must so hold. The judgment of the district court is affirmed.

## JUDGMENT AFFIRMED.

THE other judges concur.

NEILS HANSEN, APPELLEE, V. KAREN M. BERTHELSEN  
AND JAMES M. LOVE, APPELLANTS.

1. **Fraud: CONVEYANCE BY UNDUE INFLUENCE.** Undue influence exerted upon an uncle by his niece, by reason of which he conveyed to her certain real estate upon a promise to reconvey, may be sufficient to justify a court of equity in setting aside the deed.
2. **Trusts.** An express trust cannot be raised by a parol promise to reconvey real estate by the grantor.
3. **Fraud.** Where one of two innocent persons must suffer by the fraud of a third, he who trusted the third person and placed the means in his hands to commit the wrong must bear the loss.
4. **Vendor and Vendee: RETENTION OF POSSESSION BY GRANTOR.** Where a grantor remains in possession of real estate after

19	438
90	351
19	433
31	343
19	433
24	279
35	888
19	433
35	46
38	320
19	433
48	277
19	433
56	508

the execution of a warranty deed therefor, a party purchasing must ascertain by what right he retains possession. *McHugh v. Smiley*, 17 Neb., 620.

5. **Statute of Frauds: PLEADING.** While the statute of frauds is so far personal that no one but the parties can in the first instance interpose it, yet when one of the parties conveys real estate absolutely by warranty deed, and thereby disaffirms the contract, his grantee may plead the facts as a defense.

APPEAL from Dodge county district court. Tried below before POST, J.

*N. H. Bell* and *Wm. Marshall*, for appellants.

*G. L. Loomis*, *W. H. Munger*, and *E. F. Gray*, for appellee.

MAXWELL, CH. J.

This action was brought in the district court of Dodge county by the plaintiff against the defendants, to quiet the title to the sw.  $\frac{1}{4}$  of sec. 28, t. 18, r. 8, in the plaintiff, and to set aside a deed from defendant Berthelsen to Love, and compel him to convey to the plaintiff. On the trial of the cause in the court below a decree was rendered in favor of the plaintiff, the defendant Love being required to convey all his interest in said land within twenty days and that he pay the cost of suit and be allowed only the taxes paid by him on said land—about \$30.00. The defendant Love appeals.

The principal defense interposed by Love is the statute of frauds and that he is an innocent purchaser. The testimony tends to show that the land in question is situate about  $4\frac{1}{2}$  or 5 miles from Fremont; that the plaintiff purchased it in the year 1881; that the plaintiff is a native of Denmark, and in the spring of 1883 he with his wife went to Denmark on a visit, and Miss Berthelsen, a niece of his, returned with them in June, 1883. That after their return

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Hansen v. Berthelsen.

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they resided in Fremont during the remainder of the year 1883, Miss Berthelsen living with the plaintiff, but the wife leaving in October of that year. The plaintiff, in the autumn of 1883, was dealing in stock and frequently absent from home at night, and there seems to have been some difficulty between the plaintiff and his wife, caused, the plaintiff claims, by the machinations of Miss Berthelsen. Prior to the visit to Denmark, the plaintiff and his wife, having no children of their own, had obtained two boys, one six years of age and the other nine, from the Home of the Friendless in Chicago, and seem to have adopted them; and the plaintiff made a will leaving the boys all his property in case of his death, except \$1,000.

He testifies that after the return of the plaintiff and his wife to this country, Miss Berthelsen found fault with the boys, complained to him that he had a sufficient number of relatives of his own in needy circumstances, and induced him to send the boys away and destroy the will; that she found fault with his wife and misrepresented her, saying to him that "when strangers came around she (the plaintiff's wife) was better to them and took better care against them than she did against me when I got home, and there was a man always running around there more or less when I was away. She said he was a brick mason, a man of family, and a friend of mine. He had visited at my house before. She was telling me he was coming around there frequently."

Q. Did she tell you anything in regard to what your wife done—about there being anything wrong?

A. She was telling me that when I was away she was going out, and taking walks with him, and going to the restaurant, and so forth.

The result, as he testifies, was, that on or about the 10th of October, 1883, the plaintiff and his wife separated, he giving her a certain amount of property, and three or four days afterwards he claims that Miss Berthelsen induced

himself and wife to make a deed of the land to her. He testified that, "We agreed to separate, and finally my wife she wanted to part. We talked it over, and finally I agreed with her to pay her whatever she asked. I paid my wife what she asked, and she went. Miss Berthelsen said then to me, 'Well, uncle, you must, before Emma goes away' (that was my wife), 'you must get the land out of your name, and I don't think you can do it any better than to deed it over to me, because I am the only relation you have got here; you have no children or any relation; and whenever you have a chance to sell or rent it again yourself, I will be willing to deed it over to you.' Then we went over to Mr. ———'s office, and the deed was made. I paid my wife. She got her share that was agreed on in money. It was agreed between me and her that I should retain the land. What Miss Berthelsen said about making the deed to her was in reference to this same land, the Bellevue farm. I did not at that time own any other land anywhere."

He also states that the suggestion to make the deed in question came from Miss Berthelsen, and that she induced him to make the deed.

He testifies, "In the first place she was my niece, and in the second place she promised me that she was willing to deed over to me or any one that I sold to," and that he would not have made the conveyance but for the fact of her relationship and her promise to reconvey, and that she paid no consideration whatever for the land. If Hansen's testimony is to be believed, Miss Berthelsen had in some way acquired great influence over him, and in consequence of such influence obtained the deed in question. This being so, there probably was sufficient evidence to justify the court in finding, as it must have done, that the deed was acquired by undue influence. *Ashton v. Thompson*, 18 N. W. R., 918. *Kleeman v. Peltzer*, 17 Neb., 381. Pom. Eq., § 946. *Munson v. Carter*, ante p. 293.



The evidence is not very satisfactory, however, and but for the rule that a verdict or finding of a court will not be set aside unless it is clearly wrong, could not be sustained.

2d. The testimony shows that the land in question at the time the deed from the plaintiff to Miss Berthelsen was made, was worth about the sum of \$5,000; that about the 1st of May, 1884, the plaintiff and his wife, who had become reconciled, moved on to the land, and that Miss Berthelsen was then living with them; that on the 5th of May, 1884, school district No. 42, of Dodge county, conveyed to her one acre of land in said quarter section, and on the 10th of May, 1884, she conveyed to said school district one acre of land in said quarter section; both of these deeds were recorded May 10th and 11th, 1884. About this time Miss Berthelsen appears to have left the residence of the plaintiff and found employment in Fremont. A few days after going to Fremont she applied to Love for a loan on the land, but as there was a purchase money mortgage for the sum of \$1,500, and interest notes running for several years, in all about \$2,700 given by the plaintiff to his grantor, Love refused to accept the security as satisfactory, and refused to make a loan thereon. She then proposed to sell the land to him, and after several conferences she accepted his offer of \$1,000 for the land subject to the mortgage. She informed him that Hansen had rented the land of her for that year, and the testimony shows he was then living on and cultivating the same. Love did not see Hansen while the negotiations for the purchase of the land were pending, but did see him in a few days afterwards and informed him of the purchase, at which he seems to have expressed some surprise. The testimony shows that Miss Berthelsen made a deed to Love for the land in question with the usual covenants of warranty and against incumbrances, except the mortgage heretofore mentioned and taxes due on the property; that Love gave her

a check on one of the banks in Fremont for \$1,000, which money she drew from the bank and left almost immediately for Denmark; that the plaintiff, according to his own testimony, knew of her unreliable character for several months before she left, but seems to have made no effort to secure the title from her. The testimony also shows that Love had no intention to defraud Hansen, and had no knowledge of his interest in the premises except that derived from his residence on the land and the statement of Miss Berthelsen. There is no doubt he believed her statement and acted in the utmost good faith. The price, although considerably less than the actual value of the property, was not so disproportioned as of itself to be evidence of bad faith, and but for the fact that the plaintiff lived upon the land, claiming to be the owner thereof, Love's title would be perfect.

Some doubt has been expressed as to the application of the rule as to notice where a grantor continues to hold possession after the delivery of his deed, but in our view there is no reason for a distinction—the question in both cases is, by what right is he in possession? *McHugh v. Smiley*, 17 Neb., 620–630. *McKinzie v. Perrill*, 15 O. S., 168. *Grimstone v. Carter*, 3 Paige, 421. *Hopkins v. Garrard*, 7 B. Mon., 312. *Berryhill v. Kirchner*, 96 Penn. St., 489. *Pell v. McElroy*, 36 Cal., 268. *Ill. Cent. R. R. Co. v. McCullough*, 59 Ill., 166. The plaintiff, however, had placed the apparent ownership of the land in Miss Berthelsen, and permitted her to retain it after he had reason to believe according to his own testimony that she was not reliable. As between Love and the plaintiff the latter was most to blame, as he had placed in the hands of another the means for perpetrating a fraud and permitted such means to remain in her hands after he knew, or had reason to know, that the power was liable to be abused, hence the equity of Love, for the money paid by him is superior to that of the plaintiff. *Rice v. Rice*,

2 Drew., 73. *Loveridge v. Cooper*, 3 Russ., 30. *Anketel v. Converse*, 17 O. S., 11. *Resor v. O. & M. R. R. Co.*, 17 O. S., 139. In the case last cited the vendor put the vendee in possession and placed in his hands a deed of the land sold, with an agreement that it should not be considered delivered or become effectual until the purchase money was paid. The vendee subsequently put the deed on record without paying the purchase price, and mortgaged the lands to *bona fide* mortgagees for value and without notice. The court held that as against the mortgagees the vendor could not assert a claim to the land. It is said (page 142): "By *his own acts*, in putting the land and the deed of conveyance therefor into the possession of the company, he has plainly said to the world that the company was the *owner* of the land and might be dealt with as such." The rule in equity is, that where one of two innocent parties must suffer by a wrong of a third, he who by his negligence or undue confidence has been the means by which the other has been deceived must bear the loss. *Selser v. Brook*, 3 O. S., 302. *Palmer v. Dodge*, 4 O. S., 21. *Fullerton v. Sturgis*, Id., 529.

In *Selser v. Brook*, *supra*, 308, it is said: "It appears to be well settled both by reason and authority, that where one of two innocent persons must suffer by the fraud of a third person, he who trusted the third person and placed the means in his hands to commit the wrong, must bear the loss. *Lickbarrow v. Mason*, 2 T. R., 70. *Lane v. Borland*, 2 Shepley, 77. *Root v. French*, 13 Wend., 572. *Bank of St. Clairsville v. Smith*, 5 Ohio, 222. *Jennings v. Gage*, 13., Ill., 610. *Saltus v. Everett*, 20 Wend., 267. Hansen conveyed the land in question to his niece and himself placed the deed upon record. He thus held her out to the world as the owner of the land. He thereby in effect invited all persons to deal with her as owner. That she could incur this land by mortgage or otherwise will not be seriously questioned; and but for the fact

that the plaintiff was in possession could have conveyed the land free from any interest possessed by him. He reposed confidence in his niece, and as between himself and third parties who acted in good faith must sustain whatever loss there may be from a betrayal of that confidence. Any other rule would offer a premium for collusion and fraud between relatives to the prejudice of third persons. The plaintiff, therefore, must pay Mr. Love \$1,000, with interest from May 27th, 1884, together with costs, as a condition of obtaining a release of his claim.

3d. The petition is framed upon the theory of an express trust, and a recovery is sought upon that ground alone. Sec. 3, chap. 82, Comp. Stat., provides that, "no trust or interest in land other than leases for a term not exceeding one year, nor any *trust* or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by a deep or conveyance in writing subscribed by the party creating, surrendering, or declaring the same. The 4th section excepts from the operation of this provision real estate disposed of by will, and trusts arising by implication or operation of law; and the 6th excepts agreements where there has been part performance. The allegations in the petition in this case are substantially the same as in that of *Courvoisier v. Bouvier*, 8 Neb., 61, in which to establish the trust it was alleged that Bouvier, being about to go to New Orleans to obtain work, "and thinking it would be convenient and advisable that the title to said real estate should be vested in his wife in case of the plaintiff's death during his absence, the plaintiff voluntarily and without consideration, and in order to vest the title in said defendant, conveyed said premises" to her. That it was the understanding both of himself and wife that she was to hold the property in trust for him and not as her own. The alleged trust rested in parol in that case, and it was

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Hansen v. Berthelsen.

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held insufficient. In that case, however, there were the additional facts that the wife had been in possession since 1858, and that the husband had accepted a lease from her for a part of the land. Under a statute like ours an express trust in real estate cannot be raised by parol. 2 Roberts Stat. of Frauds, § 478. *Lambren v. Watson*, 6 H. & John., 255. *Robertson v. Robertson*, 9 Watts, 32. *Jackman v. Kingland*, 4 Watts & Serg., 149. It is contended on behalf of the plaintiff that the statute of frauds is personal, and that no one can plead it but Miss Berthelsen. This is true to the extent that as between Miss Berthelsen and the plaintiff no one can plead the statute for her and the defense is personal. When, however, she conveys to another and thereby denies by her act the existence of a valid contract between herself and her grantor for the reconveyance of the land, the grantee from her may set the statute up as a complete defense to the verbal contract, unless it has been so far performed as to take it out of the statute. In other words the defense is available to parties and privies. *Rickards v. Cunningham*, 10 Neb., 420. *Breckenridge Heirs v. Ormsby*, 1 J. J. Marsh, 236, 19 Am. Dec., 84-86. The defense, therefore, is available to Love.

The plaintiff has leave to file an amended petition conforming to his proof within thirty days, and he is required to pay the defendant Love the sum of \$1,000, with interest and costs, within four months thereafter, and upon condition that he complies with these requirements within the time and in the manner specified the judgment will be affirmed, except as herein modified. But in case said plaintiff fails to comply with these requirements as above provided the judgment of the district court will be reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

19 449  
30 161THE STATE OF NEBRASKA, EX REL. WILLIAM A.  
WAGNER, V. S. McDOWELL.**Municipal Corporations: OFFICERS: SALARY OF CLERK.**

Where at the time of the election of the clerk of a city of the second class no ordinance had been passed fixing his salary, an ordinance passed during his term of office fixing his salary at \$300 per annum is not within the inhibitions of the law that the compensation shall not be increased or diminished during his term of office. *Purcell v. Parks*, 82 Ill., 346. *Rucker v. Supervisors*, 7 W. Va., 661, followed.

ORIGINAL application for mandamus.

*Griggs & Rinaker*, for relator, cited: *Purcell v. Parks*, 82 Ill., 346. *Rucker v. Supervisors*, 7 West Va., 661.

*S. McDowell*, pro se.

MAXWELL, CH. J.

The conceded facts in this case are substantially as follows: The defendant is now and ever since the 20th of April, 1885, has been the mayor of the city of Beatrice, and the relator during that period has been city clerk; that at the time of the relator's election to said office no salary or compensation had been fixed for the services of the clerk. On the 28th of April, 1885, the city council of that city passed an ordinance, which was duly approved, fixing the salary at the sum of \$300 per annum; and afterwards, in December, 1885, said council ordered a warrant to be drawn for the sum of \$75, as the salary of said clerk for three months. A warrant in due form for said sum was presented to the defendant for his signature, but he refused to sign the same, basing his refusal upon the ground that at the time the relator was elected no salary or compensation had been provided for, and that the

ordinance fixing the salary has been passed during the re-lator's term of office, and therefore is in conflict with section 15, chapter 14, Compiled Statutes of 1885, which provides that, "the annual salaries of all officers shall be fixed by ordinance not exceeding the following sums, respectively: The mayor, five hundred dollars; treasurer, three hundred dollars; each councilman, three hundred dollars; clerk, five hundred dollars," etc.

Section 16, article 3, of the constitution provides that, "the legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered, or the contract entered into. Nor shall the compensation of any public officer be increased or diminished during his term of office." And sec. 29, Chap. 14, Art. II., Comp. Stat., provides that, "the emoluments of no officer whose election or appointment is required by this chapter shall be increased or diminished during the term for which he shall have been elected or appointed, and no person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed, when during the same time the emoluments have been increased."

Do these provisions prevent the city council and mayor from fixing the salary of public officers by ordinance when the power to fix such salaries had never been exercised? We think not. Where the statutes authorize the municipality to pay its officers salaries within certain limits, the amount to be determined by ordinance, no compensation whatever can be paid until an ordinance is passed. The statute is a mere grant of power which the municipality is to exercise, and until an ordinance is passed fixing the amount of salary of the several officers named, the limitations in the statute and constitution do not apply, as the salary—the thing to be increased or diminished—has no existence.

The question here presented was before the supreme court of Illinois in *Purcell v. Parks*, 82 Ill., 346, and *Rucker v. Supervisors*, 7 West Va., 661, and it was held in both cases that the restrictions did not apply where there had been no exercise of the power conferred by fixing the salary of a public officer. This, we think, is a correct interpretation of the statute. It follows that the writ must be granted as prayed.

WRIT AWARDED.

THE other judges concur.

19	444
83	806
19	444
28	110
19	444
37	150
19	444
43	452
19	444
48	757

THE STATE OF NEBRASKA, EX REL. ALBERTUS N.  
DODSON, v. CHARLES W. MEEKER.

1. **Removal of County Officers: MANDAMUS.** Where the county board, upon complaint and a hearing thereon, removes a county officer from office, renders judgment of ouster, and appoints a successor, who qualifies in accordance with the provisions of law and demands possession of the office, books, records, etc., and such demand is refused, mandamus is the proper remedy to compel the removed official to surrender such office.
2. —: **FILLING VACANCY.** County boards have authority to fill vacancies in all county offices. Where an officer of court is merely suspended it is the duty of the court of which he is such officer to "supply his place by appointment for the term" of such court. The word "suspended," in section 9 of article 2, chapter 18, of the Compiled Statutes, is not synonymous with the word "removed," in section one of the same article.
3. —: **SUPERSEDEAS BOND.** Where a county officer has been removed from office by the county board for official misconduct, and proceedings in error have been taken in the district court for the purpose of having the judgment of removal reviewed, the filing of a supersedeas bond does not supersede the judgment of removal so as to entitle the incumbent to retain the office pending the proceedings in error. The law makes no provision for staying such a judgment by the execution of such bond.



ORIGINAL application for mandamus.

*Griggs & Rinaker*, for relator, cited: Code, §§ 588, 593. *State v. Jaymes*, 26 N. W. R., 711.

*Abbott, Grim, & Ryan Bros.*, for respondent, cited: *Ex parte Thatcher*, 2 Gilm., 168. *Hannon v. Commissioners*, 89 N. C., 123. *Atherton v. Sherwood*, 15 Minn., 251. *State v. Sheldon*, 10 Neb., 453. And claimed that remedy was by *quo warranto*. *People v. Olds*, 3 Cal., 17. *State, ex rel. Lytle, v. Douglas County*, 18 Neb., 506.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus, requiring the respondent to surrender to the relator the possession of the office of the clerk of the district court of Saline county, together with the seal, books, papers, and records belonging thereto. The allegations of the relation are, that on and prior to the 4th day of August, 1885, the respondent was the duly qualified and acting clerk of said court, and that on that day a complaint was filed with the county board, charging him with various violations of the law, and which by law are made cause for removal from office. That such proceedings were had before said board as, on the 6th day of March, 1886, resulted in a finding and judgment of guilty and a removal of respondent from said office by said board. That on the same day the said board duly appointed the relator to the office of such clerk to fill the vacancy caused by such removal. That the relator had duly qualified as such officer by taking the necessary oath of office and filing a bond which was approved by the county board. That possession of said office had been demanded by relator and refused by respondent.

The answer of respondent admits the allegations of the relation as to his being the duly elected and qualified clerk of the district court, and the finding and order of the board of county commissioners of March 6th, but denies the legal sufficiency of the complaint, denies that said findings and order of the county board are of any legal force or effect, and alleges that said pretended judgment of removal is void. It is also alleged that on the 8th day of March, 1884, he presented to said board his supersedeas bond in the sum of \$1,000, with good and sufficient surety, and demanded a proper transcript of the proceedings, and that such tender of bond and demand for transcript were for the purpose of removing said cause to the district court of said county for review by proceedings in error. Said board declined to approve said bond, giving as their sole ground for such refusal a want of authority so to do, and that he thereupon procured said bond to be approved by the clerk of said district court, and filed in said court his petition in error, together with a transcript of said proceedings, and that said proceedings in error are now pending in said court. The pretended appointment of relator by said board is admitted, but it is alleged that said board had no power or authority to make the same, and that said pretended appointment was void. Upon the hearing it was stipulated that relator had taken the oath of office and filed his bond as alleged by him, and that proceedings in error were pending in the district court as alleged by respondent.

The contentions of respondent are, that mandamus is not the proper remedy, there being a complete remedy by proceedings in the nature of *quo warranto*; that the relator has not been legally appointed, and that a supersedeas bond having been filed and the cause removed into the district court by proceedings in error, the judgment of the county board is superseded and respondent is entitled to hold the office until a final determination of the case.

As it seems to us, the first question must depend on the other two for a solution. If the removal of respondent was valid in law, thereby creating a vacancy in the office, and if the county board had authority to appoint relator, and the proceedings in error have not superseded the judgment of removal, then it would be clear that relator is entitled to the office. This right being conceded, it is pretty clear that mandamus would be the proper remedy. *State, ex rel., v. Jaynes, ante p. 161.*

The next contention, that relator has not been legally appointed, calls in question the authority of the county board to appoint a clerk of the district court in case of the removal of an incumbent. Section 101 of chapter 26 of the Compiled Statutes, 1883, provides that, "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office," etc. Section 103 provides that, "vacancies shall be filled in the following manner: In the office of the reporter of the supreme court, by the supreme court. In all other state and judicial district offices, and in the membership of any board or commission created by the state, where no other method is specially provided, by the governor. In county and precinct offices by the county board," etc. The office of clerk of the district court being a county office, the power is here given to fill a vacancy therein. But it is insisted by counsel for respondent that section 9 of chapter 18, Id., especially confers this authority upon the district court. This chapter provides the method of removal of county officers from office, and the section above referred to is as follows: "When the accused is an officer of the court and is *suspended*, the court may supply his place by appointment for the term." (The italics are our own.) It is insisted that the word "*suspended*," as used in this section, must be taken and con-

strued as anonymous with "removed," as used in other sections of the chapter. The first section provides that, "all county officers, including justices of the peace, may be charged, tried, and removed from office for official misdemeanors in the manner and for the causes following," etc. Section 7 is as follows: "The questions of fact shall be tried as in other actions, and if the accused is found guilty, judgment shall be entered removing the officer from his office, and declaring the latter vacant, and the clerk shall enter a copy of the judgment in the election book."

It is the opinion of the court that the word "suspended," as it occurs in section 9, cannot be given the meaning contended for. It was evidently the mind of the legislature that cases *might* arise, either growing out of the circumstances of the case or by an express provision of law, that an officer would have of necessity to be suspended, pending the investigation of charges against him; and that in case the suspended officer should be an officer of a court, or particularly of the one hearing the charges, his place might be supplied temporarily in order that the business of the "term" might not be interfered with, without the accused having to be removed from the office as a condition precedent to such appointment. Without this section ample provision is made for the appointment of officers to fill vacancies, and we can see no sufficient reason for giving the word any other meaning than that to which it is ordinarily and usually entitled.

The next and last question is as to the effect of the proceedings in error for the purpose of reviewing the judgment of removal. The *right* of the respondent to prosecute proceedings in error is not questioned by the relator. But the question is, assuming that respondent has that right, does the bond filed by him suspend the judgment of removal until a final hearing in the reviewing court? It is not claimed by respondent, and could not rightly be so

claimed, that any provision of statutory law can be found which would give the right to supersede this judgment. While section 588 of the civil code makes provision for a stay of execution in the cases therein named, yet cases of this kind do not come within its provision. As was said by Chief Justice MAXWELL in *The State, ex rel., v. The Judges*, ante p. 149, "The provisions for a *supersedeas* are not as broad as those for the review of judgments on error." But it is insisted that section 901 of the civil code is intended to apply to cases of the kind at bar, and that by its provisions a stay of proceedings can be had as by the former practice when the writ of error existed as a writ of review. There are some, to us, insurmountable objections to this view. By section 509 of the civil code, the writ of error is abolished, but the power of courts to compel complete and perfect transcripts, etc., as in writs of error, is preserved. Judgments and final orders are as much the subject of review as they were formerly, but the power of review is given alone by statute by proceedings in error without the intervention of the allowance of a writ of error, acceptance of bail, etc. Section 901 is as follows: "Rights of civil action given or secured by existing laws shall be prosecuted in the manner provided by this code, except as provided in the following section. If a case ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice."

While we need not stop now to enquire just what cases might arise where "the enforcement or protection of a right or the prevention of a wrong" could not be had, it is clear that this case is not one of those described in this section. Ample provision is made by law for the redress of the wrong complained of and the protection of all rights by

the proper tribunal, and a method of procedure is provided. The right of review by appeal or proceedings in error is a statutory one. *Wilcox v. Saunders*, 4 Neb., 569. *State v. Ensign*, 11 Id., 531. Secs. 580 and 777, civil code. Provision having been made for the review of all judgments and final orders made by inferior tribunals, and special provisions having been made for a stay of execution in certain cases (section 588, civil code), it must be taken as the legislative will that other cases are excluded. In this connection it is urged with considerable force that if respondent is not permitted to supersede the judgment of the county board, if the judgment of ouster against him should be finally reversed, he would be deprived of his office and the emoluments thereof, without any recourse upon the relator. Whether or not this is true we need not now decide; but if it is, it is an omission which can be corrected by the legislature alone. But it may also be said that the law of removals from office must have been intended as a somewhat summary method of removing officials who were violating the law; and if the decisions of county boards may be locked up by a supersedeas bond, the short official tenures of county officers in this state would enable a corrupt official to hold the office until the expiration of his term, in defiance of all efforts to remove him for official misdemeanors. This is not intended as a reflection, in any degree, upon the merits of the case pending in the district court, but as a suggestion, in a general way, that the omission of the legislature to provide a method of superseding may not have been an oversight. It must be so treated until otherwise expressed. In this connection it would not be deemed improper, perhaps, for us to add, that in cases of this kind, where, if a judgment of removal, if wrongful, would work great hardship to the removed official, it is apparent that reviewing courts should render all practicable aid to such person by granting an

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B. & M. R. R. Co. v. Dobson.

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early hearing and determination of such cases, in order that the injury, if any, might be as light as possible, but further than this they cannot go.

A peremptory writ must be allowed as prayed.

WRIT ALLOWED.

THE other judges concur.

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BURLINGTON & MISSOURI RIVER RAILROAD COMPANY  
IN NEBRASKA, PLAINTIFF IN ERROR, V. THOMAS  
DOBSON, DEFENDANT IN ERROR.

**Jurisdiction of Supreme Court: IMPROVEMENTS.** In proceedings in error to review a judgment of the district court, whereby the value of improvements, rents, and profits, and of the real estate, was found upon appraisement, the supreme court has no authority to order a reference for the purpose of ascertaining the value of rents and profits accruing after the verdict or assessment of the appraisers and during the pendency of the proceedings in the supreme court.

ERROR to the district court of Seward county. Tried below before GEORGE W. POST, J.

*Marquett, Deweese & Hall*, for plaintiff in error.

*William Leese*, for defendant in error.

REESE, J.

After the opinion in this case, which is reported in 17 Neb., 455, was filed, plaintiff in error filed a motion for a reference of the cause to a referee, to take testimony as to the value of the net rents and profits of the land received by defendant since the finding of the jury below,

and to ascertain the amount of taxes paid by defendant. The application being made in the absence of defendant, the order of reference was granted, but on condition that all questions of law should be reserved by the court until the report of the referee was made. Upon the report being filed, the defendant filed exceptions thereto, the second and third of which are as follows:

"2d. There is no law or authority whatever to allow the plaintiff any rents and profits during the time it has been disputing the judgment of the court below by proceedings in error.

"3d. This court is without jurisdiction to make the order referring this case for the purpose of ascertaining the net value of the annual rents and profits since the date of the finding of the jury in the district court."

The question here presented is, whether or not the court has power under the statute to order a new reference, either to a referee or a jury, for the purpose of ascertaining the value of rents and profits after they have once been ascertained by the verdict of a jury of appraisers appointed by the district court.

Section 3 of chapter 63 of the Compiled Statutes of 1885 provides, that the court rendering the judgment or decree of eviction shall, at the request of the occupant or claimant, issue an order to the sheriff of the county wherein the real estate is situated, to summon three disinterested freeholders of such county, whose duty it shall be to appraise such real estate and the improvements at their cash value. This order issued to the sheriff to be accompanied by written instructions from the court to the appraisers. By section 4 it is provided that the appraisers shall jointly view the real estate and assess the value of the improvements, the rents and profits, and of the land. It is further provided in this chapter that upon the report of the appraisers having been made, a judgment shall be rendered thereon according to the return, unless the same is set



aside for cause shown. This was all done in the case at bar, but plaintiff, not being satisfied with the action of the court, removed the case to this court by proceedings in error, where, as we have seen, the judgment was affirmed. 17 Neb., 455. The judgment of the district court during all the time has remained in force, and so remains at this time. We know of no provisions of law, except those above referred to, for ascertaining the value of rents and profits. Neither do we find any provision in the statute for any other assessment than by the tribunal provided by the third section of the act. The proceeding in this court in this case was simply one of review, and when the judgment was affirmed it remained only for the district court, upon being notified of the fact, to carry it into effect.

We are of the opinion that the reference of the case was without authority of law, and the report of the referee should be set aside. Judgment will be entered accordingly.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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DAVID H. SKINNER, PLAINTIFF IN ERROR, V. JOHN M.  
MAJORS, DEFENDANT IN ERROR.

**Contract: BREACH.** In an action on contract for damages for withdrawing certain cattle from the herd of the plaintiff during the herding season, it being stipulated in the contract that plaintiff should not receive more than two hundred head of cattle in his herd, and it being admitted by the plaintiff on the stand as a witness in his own behalf, that when defendant's cattle were withdrawn from the herd there were 203 other cattle in the herd; and it also appearing from the evidence that plaintiff's herd ground was scant and probably deficient; *Held*, Error on the part of the court to refuse an instruction giving a fair expression of the law as to the right of the defendant to remove his cattle under such state of facts.

ERROR to the district court of Saline county. Tried below before MORRIS, J.

*Hastings & McGintie*, for plaintiff in error.

*J. H. Grimm*, for defendant in error.

COBB, J.

This action was brought on a written contract, which I here copy :

"This agreement, entered into 24th day of April, 1882, between D. H. Skinner and Mich. Majors, witnesseth, that the said D. H. Skinner, in consideration of the covenants of the said Mich. Majors hereinafter set forth, does hereby let to the said Mich. Majors, on or about the above date, his herd of cattle, consisting of from 125 to 150 head, to be herded during the herding season of the year 1882 for the consideration of one dollar and twenty-five cents per head for the full herding season, and a *pro rata* amount for those that may be herded during a part of the herding season. The said Mich. Majors, for and in consideration of the above named amount of money, does hereby covenant and agree to take good and faithful care of the above cattle, and to see that they have salt not less than twice per week. The said Majors also agrees to be responsible for the cattle while in his care; also, that he (Mich. Majors) will make good by paying an equivalent for all cattle that may disappear, or be crippled, or die, or meet with an accident or injury in any way, except it be by natural death or by unavoidable accident; and in case of death or injury the said Mich. Majors agrees to notify the said D. H. Skinner of the same. The said Mich. Majors also to furnish the above cattle with plenty of water and pasture at all times, and in case his pasture should become insufficient for the cattle before the close of the herding season, the

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Skinner v. Majors.

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said Mich. Majors agrees to notify said D. H. Skinner, and allow the said D. H. Skinner to remove his cattle by paying a *pro rata* sum for the time occupied in herding. The said Mich. Majors also agrees to take not more than two hundred head of cattle in his herd." Signed by D. H. Skinner and J. M. Majors.

The action was brought by John M. Majors, plaintiff, against David H. Skinner and John W. Hitchcock, defendants.

The plaintiff's petition embraces three causes of action, the first being for a breach of the contract above set out; the second being for board and labor furnished and performed by the plaintiff for the defendants to the amount and of the value of ten dollars; the third count being for damages sustained by the plaintiff in and about pursuing the said defendants for the purpose of recovering a certain steer belonging to another party, and for which plaintiff was responsible, and which was driven away by defendants with their herd, and for which damages plaintiff claimed the sum of ten dollars. The plaintiff prayed judgment in the sum of one hundred and fifty dollars.

The defendants answered, denying that they ever entered into the contract declared upon, but admitting that the defendant D. H. Skinner entered into a contract with the said plaintiff of the general tenor and effect of the contract set out in plaintiff's petition. Defendants also allege, in and by their said answer, that, pursuant to said contract and agreement, said D. H. Skinner furnished to said plaintiff 126 head of cattle on the 26th day of April, 1882, and five head of cattle on the 27th day of April, 1882, and nine head of cattle on the 8th day of May, 1882, and took out one head of cattle on the 13th day of May, 1882, to pasture and herd as before agreed upon in said agreement; but that said plaintiff did not take good care of said cattle; did not give them salt twice a week; did not furnish said cattle plenty of water and pasture at all times, and that

said plaintiff did take more than two hundred head of cattle in his herd; that said plaintiff neglected his duties as a herder and carer for cattle, worried and permitted them to be worried by dogs and men; kept them in a close pen or yard during a large portion of the time; neglected to furnish them with salt, and neglected to give them water or pasture, so much so that said cattle became poor and feeble; and that on the 29th day of May, 1882, said D. H. Skinner, under and by virtue of the terms of said agreement, took said cattle and removed them, as he had a right to do, and that said Skinner paid said plaintiff for herding said cattle, at and before the time he took them away from said plaintiff, the sum of \$38.00, and then and there duly tendered said plaintiff the further sum of one dollar and five cents, which was all that was due the said plaintiff from these defendants, or either of them. They also allege that one of said cattle of the value of \$30 died, and was wholly lost through the neglect of said plaintiff. They deny all other allegations of said plaintiff's petition.

The plaintiff, by his replies, denied each and every allegation of the answer, except as to the number of cattle, and the amount of money paid, and the amount tendered by defendants to the plaintiff.

There was a trial to a jury, with verdict and judgment for the plaintiff against the defendant Skinner for the sum of one hundred and one dollars, and for the defendant Hitchcock and against the plaintiff. The defendant Skinner brings the cause to this court on error.

There are fourteen errors assigned, but it is not deemed necessary to examine more than one of them for the purpose of presenting the conclusion to which I have arrived. Plaintiff in error assigns as error the refusal by the court to give in charge to the jury number 9 of instructions, as prayed by the defendants. The following is the instruction refused:

"9. If the jury find that Majors took more cattle into his herd than agreed upon, without the consent of Skinner, then Skinner had the right to remove his cattle, and the plaintiff should not recover any damages for the breach of the contract."

This was an action for the breach of a contract. There is no claim for a *quantum meruit*. The plaintiff admitted upon his cross-examination, when on the stand as a witness on his own behalf, that the \$38 received by him from the defendants, and the one dollar and five cents tendered, which tender was admitted in the pleadings, was about the contract price for keeping the cattle for the whole length of time that they were in fact in his possession. By the express terms of the contract he agreed "to take not more than two hundred head of cattle in his herd." Upon plaintiff's cross-examination above referred to, he stated that when defendants took their cattle away he had 203 head of other cattle in his herd.

It is apparent from the testimony that the plaintiff's herd ground was limited and of scant dimensions, as well as of inferior quality, and it is placing the construction upon the contract the most favorable to the plaintiff to say that the contract was entered into with special reference to the particular tracts and parcels of land upon which the cattle were to be herded. It is fair also to presume that the plaintiff in error knowing the scant quantity and inferior quality of the grass, was induced to stipulate as he did, that the number of cattle to be herded by the plaintiff, including those of defendant, should not exceed two hundred head. This was a lawful as well as a reasonable stipulation to make, and was as binding on the parties as any provision of the contract, and was one to which the defendants had a right to have the attention of the jury directed by a proper instruction. The instruction above quoted fairly presented the point, and should have been given.

As for the above error there must be a new trial, none of the other errors assigned will be examined.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

GEORGE MASTERS, PLAINTIFF IN ERROR, V. ELLEN A. MARSH, DEFENDANT IN ERROR.

1. **Bastardy: EVIDENCE.** Upon a trial in the district court in a proceeding under the provisions of the statute for the support and maintenance of illegitimate children, it is not error on the part of the court to refuse to allow counsel for the defendant to cross-examine the prosecutrix as to what she testified to in her examination before the magistrate before whom the proceeding was instituted, her examination before the magistrate being certified up.
2. ———: ———. On such trial it was not error for the court to sustain the objection of counsel for the plaintiff to the question put to her on cross-examination by counsel for the defendant in the following words: Didn't you have intercourse with \* \* \* there in that house about that time? "the time referred to being shown by the context to be about nineteen months before the birth of the child.
3. **Trial: OFFER OF EVIDENCE.** In order to predicate error upon the sustaining by the court of an objection to a question propounded to a party's own witness, the party must make an offer to prove the fact or facts sought to be elicited by the question.
4. ———: **ACCOUNT BOOKS** are admissible as evidence in an action only where they contain charges by one party against the other, etc.

19 458  
20 373  
22 86  
23 694  
19 458  
25 128  
26 212  
26 548

19 458  
33 365  
19 458  
23 874  
29 589  
19 458  
34 661  
36 256

19 458  
36 416  
19 458  
128 110

19 458  
46 394

19 458  
45 481

19 458  
47 832  
48 613

19 458  
62 371n  
62 427n

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

*J. W. Eller*, for plaintiff in error, cited: *Spurgeon v. Clemmons*, 6 Neb., 307. *Young v. Makepeace*, 103 Mass., 53. *Altschuler v. Algaza*, 16 Neb., 631. *McCoy v. People*, 65 Ill., 439. *State v. Read*, 45 Iowa, 469. *Zweifel v. State*, 27 Wis., 396.

*John P. Maule*, for defendant in error, cited: 1 Greenleaf Evidence, 514, 515. *Duffies v. State*, 7 Wis., 567. *Eddy v. Gray*, 4 Allen, 435. *Paull v. Padelford*, 16 Gray, 263. *Commonwealth v. Moore*, 3 Pick., 194.

COBB, J.

The plaintiff in error was tried on the complaint of Ellen A. Marsh, found guilty by the verdict of a jury, and adjudged to be the reputed father of the bastard child of said Ellen, and to stand charged with the maintenance of said child in the sum of five hundred dollars, and to pay the costs of suit. To the proceedings in the trial court he assigns sixteen errors.

The first assignment is, that the court erred in sustaining the objection of counsel for the complainant to the following question put to the complaining witness upon her cross-examination.

"Q. Did you not state in your examination before Mr. Dimock, justice of the peace, that it was in the latter part of November that you went and looked at the book to see the date the lard was bought." The third and fourth errors assigned are for sustaining the objections of counsel for complainant to questions of the same character put to the same witness, all referring to her statements made before the examining magistrate when on oath upon her original examination. These three assignments may

then be considered together. The sole object of asking these questions was to obtain from the witness either an admission or a denial that she had made such statements in her examination before the magistrate. In ordinary cases such cross-examination for such purposes is doubtless admissible, but in bastardy cases the reason or necessity for such examination does not exist. Section 1 of chapter 37, Comp. Stats., provides that, upon the arrest of any person accused of being the father of a bastard child, the justice "shall examine the complainant under oath respecting the cause of her complaint, and such accused person shall be allowed to ask the complainant, when under oath, any question he may think necessary for his justification; all of which questions and answers, together with every other part of the examination, shall be reduced to writing by the justice of the peace," etc. Section 5 of the same chapter provides that, "at the trial of such issue the examination before the justice shall be given in evidence," etc. It appears from the record that this course was pursued in the case at bar, and the testimony of the complaining witness as given before the magistrate, having been taken down in writing and produced on the trial, it would have been a waste of time, to say the most of it, on the part of the court, to have permitted the defendant's counsel to cross-examine the complainant as to what she testified to before the magistrate. If her statements before the jury were inconsistent with those made before the magistrate, such inconsistency would furnish a fair ground for invalidating her testimony and of attacking her credit before the jury, and no cross-examination was necessary for that purpose.

The second error assigned is, the sustaining by the court of the objection by counsel for complainant to the following question put to complaining witness on her cross-examination, by defendant's counsel:

"Q. Didn't you have intercourse with Tot Conner there in that house about that time?"



By reference to the context, it appears that the house referred to was Roper's restaurant or eating house, at Geneva, and the time referred to was the time of the county fair "about two years ago." The trial took place on the 6th day of November, 1884. The child was born on the 7th day of June, 1884. It is conceded, and must be, that the defendant may show by the complainant, or any other witness, that she had intercourse with any man, other than the defendant, at or about the time when the child must have been begotten, according to the usual course of nature. The period of gestation may be safely stated as a general proposition at from two hundred and fifty-two to two hundred and eighty-five days. Allowing the greatest latitude of enquiry I think it should be confined to a period of time between the lowest number of days above stated and that of three hundred days before the birth of the child. The time referred to by the question which we are now considering, "about two years ago"—two years before the 6th day of November, 1884—was about nineteen months before the birth of the child. If the prosecutrix had admitted that she had intercourse with the person named at that time, it would have had no tendency to disprove the charge that the defendant was the father of her child. The 3d, 4th, and 5th assignments of error fall within the above facts and reasoning, and hence need not be specifically stated. The above remarks will also apply to the 10th assignment of error. Under this head counsel groups five questions put to the witness Walters, to the giving of which the court sustained the objection on the part of the complaint that the same were irrelevant and immaterial, the time not being fixed. The purport of all these questions is, whether the witness had seen the prosecuting witness together with a young man named Tot Conner, in the night time, go into an unoccupied house in the village of Exeter. In no instance was the time fixed, so that any answer indicated by the frame of the question would have been material, or

tended to prove any fact disproving the charge that defendant is the father of the child. In this connection it is proper to say that this witness, John Walters, was a witness called on the part of the defendant. It may be said to be the settled law of this state, that in order to predicate error upon the sustaining by the court of an objection to a question propounded to a party's own witness, the party must make an offer to prove the fact or facts sought to be elicited by the question. See *Mathews v. State*, ante p. 330.

This rule seems to have been lost sight of by counsel, as it was especially applicable to the questions which we are now examining. Even had the time been fixed, when the questions suppose that the prosecuting witness may have been seen entering the unoccupied house with the young man named, to be at or about nine lunar months before the birth of the child, the facts indicated by the question unaccompanied by other facts would have been of but little if any value as casting doubt upon the parentage of the child, while if followed by an offer to prove other and additional facts, such as their being alone, the length of their stay, etc., they might have been of considerable value.

The sixth error is, "that the court erred in sustaining the objection to the following question asked of Charlotte J. Marsh, mother of plaintiff, on her cross-examination:

"Q. Did you not know of her (Ellen, the plff.) having an abortion before she was in the family way with this child?"

This witness had testified to nothing in her examination-in-chief, upon which the above question could be considered cross-examination. Besides she had just testified on her cross-examination that she did not know of her daughter "ever being in a family way before this time," and it was utterly irrelevant to the inquiry in hand whether she had had an abortion or not.

The 7th assignment of error is, "that the court erred

in sustaining the objection of counsel for the prosecutrix to the following questions asked John Linden on his cross-examination:

"Q. 1. When she told you, how did this conversation come up, when she told you that she was in the family way?

"2. What did you say when she told you that, that she was in the family way?

"3. Did she tell you once before that she was in the family way?"

The first two of these questions were objected to by counsel for complainant for the reason that it was not cross-examination, and was irrelevant, which objection was sustained. In this I think the court erred. It certainly was cross-examination in view of the object for which this witness was placed upon the stand, and of his examination-in-chief. There were doubtless such circumstances of familiarity and opportunity existing between this witness and the prosecutrix as to render it necessary in the opinion of her counsel to call him as a witness on her side, and by his testimony negative such conclusions as might be drawn from these circumstances. In his examination-in-chief he had negatived these circumstances, but he had testified to a condition of innocent familiarity between himself and the prosecutrix, not only quite unusual in our state of society, but which, as I view it, rendered every communication and conversation between them at about that period a proper subject of cross-examination and criticism. Yet, nevertheless, I do not think the said error sufficiently prejudicial to the defendant to call for a reversal of the judgment for the sustaining of said objections. The witness denied any act of intercourse with the prosecutrix, and it is not to be presumed that with any latitude of cross-examination he would have reversed his testimony in that respect. Indeed, there is no logical sequence between any answer which he could have been expected to give to either of the questions

and the capital fact in the case—the parentage of the child.

As to the third of the above questions, it was repeated in a slightly modified form, allowed by the court, and answered by the witness, which answer completely covers and satisfies the question in its original form.

The 8th error assigned arises upon the sustaining by the court of the objections of counsel for the plaintiff to three questions put by counsel for the defendant to Francis Marsh, father of the plaintiff, and a witness in her behalf, on his cross-examination.

“Q. 1. Did you or did you not tell Tom Powell, then in your meat shop, on the day that Masters was arrested, or about that time, that Masters was the father of that child, and that he took the girl Ellen away from the wash-tub and done it to her three times in about fifteen minutes?”

“2. Did you or did you not in that conversation tell Mr. Powell that Mr. Masters had intercourse with your daughter three times in Dogtown, or words to that effect?”

“3. When did you first find out or learn that your daughter was in the family way with this child?”

In her examination-in-chief, the complaining witness had stated that she identified the day when the child was begotten by the fact that on that day a certain item of account was charged to the defendant on her father's account books. This witness, her father, was called to testify as to the day upon which that entry was made in his books. His examination-in-chief was confined to that point alone, except that he testified that he saw the defendant on that day “just as he was going away.” It will thus be seen that the questions objected to and ruled out were not only not legitimate cross-examination, but utterly irrelevant and inconsequential so far as the serious investigation of the issue involved in the case was concerned.

The 9th, 11th, 12th, 13th, 15th, and 16th errors assigned are each identical with some one of those already consid-

ered and found not well taken, and it would be but a mere repetition of words to examine them each in detail, which time and space admonish me not to do.

The 14th assignment of error is, however, of a very different character. It is as follows:

"14th. The court erred in admitting in evidence against objections the entries of C. C. Vanaum's books."

The prosecutrix had testified on her examination-in-chief that the defendant was the father of her child; that he had intercourse with her five times, the last time being on the 25th day of September, 1883, in her father's house in the village of Exeter. She identified the date by the fact that on the same day of the last intercourse with her the defendant also bought some lard of her mother, which was charged to him under that date in her father's account books. That when she began to fear that she was in the family way, she went and examined the books, found the charge, and fully identified the date of the charge as the day on which the child was begotten, etc. After the case was rested on the part of the plaintiff, the defendant took the stand as a witness in his own behalf, and testified that he was at his own home engaged in threshing on the said 25th day of September, 1883, and was not at the village of Exeter at all on that day. Witness professes to account for where he was and what he was doing during the whole of every day, from Sunday prior to the 25th day of September to the 16th day of October, following. Among other things he testified that on Friday, which, according to his previous statement was the 28th day of the month, he "went again to help Mr. Hussman thresh, and it set in windy and cold and I quit, and that is all I helped him." On his cross-examination he adhered to the date of his helping Hussman thresh. I suppose it must have been for the purpose of contradicting this statement of the defendant by showing that Mr. Hussman marketed his last grain on the 27th, and hence must have been done

threshing before the 28th, that plaintiff afterwards called A. B. Vanaum, bookkeeper to C. C. Vanaum, a grain buyer of Exeter, and offered the books of said C. C. Vanaum showing an entry under date September 27th, as follows:

"Husman Wheat.

"4200.

"1170,

3030 Roster."

The books were received in evidence over the objection of the defendant. Upon cross-examination the witness stated that aside from the entry in the book he had no recollection of the fact or date of the delivery of the wheat. He "only goes by the date in the book."

Section 346 of the civil code provides that, "Books of account containing charges by one party against the other, made in the ordinary course of business, are receivable in evidence only under the following circumstances, subject to all just exceptions to their credibility: *First.* The books must show a continuous dealing with persons generally, or several items of charges at different times against the other party in the same book. *Second.* It must be shown by the party's oath, or otherwise, that they are his books of original entries. *Third.* It must be shown in like manner that the charges were made at or near the time of the transaction therein entered, unless satisfactory reasons appear for not making such proof. *Fourth.* The charges must also be verified by the party or the clerk who made the entries, to the effect that they believe them just and true, or sufficient reason must be given why the verification is not made."

The above section embraces the only legal authority known to the writer for the reception of books of account as evidence in legal proceedings, and it is seen at the merest glance that this authority to receive such books in evidence is confined to "Books of account containing charges by one party against the other." I cannot conceive

of a book account or an account book being properly receivable in evidence in any case under the chapter providing for the support of illegitimate children, but if such case ever should arise it will certainly be where the book is kept by or the charge made by or against one or the other of the parties to the suit.

If the account books of Mr. Vanaum are legal evidence in this suit between these parties for the support of this illegitimate child, it then follows that the private account books of every person in the county who keeps account books, for whatever purpose, could by the compulsory process of the law be brought into court and subjected to the espionage of the parties to any pending litigation. It matters not that in the case at bar the books of Mr. Vanaum appear to have been voluntarily produced.

I therefore reach the conclusion that the district court erred in admitting the said account books in evidence, and I see no escape from the conclusion that such error is fatal to the judgment, while I do not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground, nor can this court risk the consequences of the precedent which it would set, should it hold such error to be without prejudice.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

JOHN STOUGH, PLAINTIFF IN ERROR, v. JOSEPH STEFANI,  
DEFENDANT IN ERROR.

1. **Conversion.** A delivered railroad ties on the bank of the Missouri river for B, but before B accepted and took possession of them they were taken by C. *Held*, That A could maintain an action for the conversion of the ties.
2. ———. The wrongful taking of property and appropriating the same to the party's own use constitutes conversion.
3. **Error.** An error in favor of the plaintiff in error is not cause for reversing a judgment.
4. **Instructions.** Unless instructions asked are applicable to the testimony it is not error for the court to refuse the same.

ERROR to the district court for Dixon county. Tried below before CRAWFORD J.

*W. E. Gantt*, for plaintiff in error, cited: 2 Greenleaf Ev., §§ 636, 640. *Aultman v. Reams*, 9 Neb., 487. *Carlisle v. Kinney*, 66 Barb., 363. *Salt Springs Bank v. Wheeler*, 48 N. Y., 495.

*J. J. McAllister*, for defendant in error, cited: Benj. Sales, § 701. *Kein v. Tupper*, 52 N. Y., 550. *Parson's Mercantile Law*, 42, note 1.

MAXWELL, CH. J.

This action was brought by the defendant in error against the plaintiff to recover the value of 1,188 railroad ties, which it is alleged he converted to his own use. Stough in his answer denies that Stefani was the owner of the ties in question; denies that he converted said ties to his own use; and denies that he does or did detain the same as alleged. There seems to be no conflict in the testimony as to the facts that Mr. Stough obtained the ties in question,



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Stough v. Stefani.

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and that they belonged to Stefani. These facts are substantially admitted.

The testimony tends to show that in 1876 and 1877, Stefani was a resident of Dakota territory; that in July, 1877, he was indebted to one Roden and agreed to deliver him railroad ties at twenty cents each at the Ponca landing in this state, to pay said debt; that in pursuance of said contract he did pile up the ties in question at the Ponca landing, on the bank of the river. The ties, however, were never accepted nor taken possession of by Roden; that in 1877 Stough was engaged in the business of buying ties, and bought about sixty thousand or seventy thousand during that year; that in the spring of 1877, a Mr. Welty said to Stough that he had a tax title against Stefani for S. B. Stough & Co., and that Stefani wished to pay him in ties at twenty cents each, and that he would take the ties if he could sell them to him. Stough testifies that he said he "would take the ties from him, and when the railroad company paid him for them he would pay him (Welty) for them;" that he "presumed that they (the ties on the bank) were the ties Stefani put there for S. B. Stough & Co., and did not know anything different." That he "saw nothing of Roden or Stefani till along in the fall of 1878, and Stefani came to me and said I should pay Roden for the ties." He also testifies that he stated to Roden that he "thought they were S. B. Stough & Co.'s ties, and that if they were his he held himself ready to restore them. I said I would furnish him other ties nearer his house, which I consider better ties. He said he did not want the ties but wanted pay for them." There is also testimony in the record tending to prove that Mr. Stough stated that he had purchased the ties in question from Stefani. The evidence is quite voluminous, and need not be copied here at length. On the trial of the cause in the court below the jury returned a verdict for the sum of \$357.48, upon which judgment was rendered.

The first error relied upon in the brief of the plaintiff in error is, that the plaintiff below has failed to prove that he was the owner and entitled to the possession of the ties, and 2 Greenleaf Ev., § 636, is cited to sustain the position, where it is said, "to entitle the plaintiff to recover two points are essential to be proved: (1) property in the plaintiff and the right of possession at the time of conversion, and (2) a conversion of the thing to his own use." The testimony in this case clearly shows that Stefani was the owner of the ties at the time he placed them on the bank of the river at Ponca landing, and that Roden never accepted or took possession of them, or claims any ownership in them. That Stough soon afterwards—about July 15th, 1877, took the ties away is not disputed, but it is claimed that he took them under a mistake. If this is true, still the offer to return *other* ties is not a defense. If Stough converted the ties to his own use he did so when, without authority, he carried the same away from Ponca landing; and the testimony clearly shows that Stefani was the owner of them at that time. The first objection, therefore, is untenable.

2. It is claimed that the facts proved do not show a conversion, and a large number of authorities are cited to show what facts do constitute it. Without entering into a discussion of the various definitions of the word "conversion," all the cases seem to agree that the wrongful taking and appropriation of the property of another by a party constitutes conversion. The testimony upon that point, if believed by the jury, was sufficient to warrant a verdict.

3. That the assessment of damages is too great, interest being assessed at 7 per cent from the date of the conversion. This error, if such it is, is in favor of Stough. The act of the legislature changing the rate of interest from 10 per cent to 7, where there was no contract for a higher rate, took effect on the 1st day of June, 1879.

Prior to that time interest was recoverable in such cases at the rate of 10 per cent. Mr. Stough, therefore, has no cause of complaint that he was not charged a higher rate of interest than 7 per cent prior to June 1st, 1879.

4th. The attorneys for Mr. Stough asked the court to give the following instructions :

"2. The jury are instructed that if it is shown by the testimony in this case that defendant took the ties, thinking said ties were his, and immediately on discovering his mistake offered to return them to plaintiff and plaintiff refused to accept, your verdict will be for the defendant.

"7. The court instructs the jury that if they believe from the testimony in this case that the defendant took the ties, thinking that they had been shipped to S. B. Stough & Co., and upon his finding out his mistake he offered to return said ties to plaintiff at any place he might designate, and did not afterward exercise any act of ownership over said ties, then they will find for the defendant.

"8. The jury are instructed that if defendant took the ties, the subject of this action, under the belief that said ties belonged to him, and upon being notified that said ties were not shipped to him, and did not belong to him, he offered to return said ties to the plaintiff or to any persons for plaintiff, at any place plaintiff might designate, then plaintiff cannot recover for said ties without proof of a demand by plaintiff, and a refusal by defendant to return said ties."

The court refused to give the same, and such refusal is now assigned for error. It is sufficient to say that they were not applicable to the testimony and were properly refused. There is no error apparent in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ISAAC CONNOR, PLAINTIFF IN ERROR, v. JOHN P.  
HINGTGEN, DEFENDANT IN ERROR.

1. **Statute of Frauds: WAIVER.** Where the defendant in his answer admits substantially the contract set out in the petition, but alleges that the plaintiff has violated its provisions, and there is no plea of the statute of frauds, the statute will be considered as waived.
2. **Contract: PARTNERSHIP: SALE.** Where A and B were in partnership in the grocery business, and A sold his interest in the business to B, if he would take his interest in certain rooms over the store at \$100 per year, for such time as should thereafter be agreed upon with the owner of the building, for certain repairs which A had made on said rooms, and the time was afterwards fixed at two years, *Held*, That the sale of the interest in the firm and the leasehold constituted but one contract.

ERROR to the district court for Dixon county. Tried below before CRAWFORD, J.

*W. E. Gantt*, for plaintiff in error, cited: *Hanlon v. Wilson*, 10 Neb., 188. *McCormick v. Drummatt*, 9 Neb., 384. *Friedhoff v. Smith*, 18 Neb., 6. *Rickards v. Cunningham*, 10 Neb., 417.

*Barnes Bros.*, for defendant in error, cited: *Morrissey v. Kinney*, 16 Neb., 17. *McDonnell v. Dodge*, 10 Wis., 92. *Wallingford v. Burr*, 15 Neb., 204.

MAXWELL, CH. J.

In order that the questions at issue may be fully understood, it is necessary to set out the pleadings. The plaintiff alleges in his petition:

"1st. That during the year 1882 the plaintiff and defendant were partners in the grocery business in the village of Ponca.

"2d. That in August of that year he sold to defendant his interest in said business, and the partnership was dissolved; that at that time the plaintiff was occupying the upper part of the building in which said grocery business was carried on.

"3d. That previous to the time of making said sale the plaintiff, under an agreement with one John Breslin, the owner of said building, fitted up the upper part of said building as a residence, and by the terms of said agreement was to occupy and have the use of the same for such time as, at a rental of one hundred dollars a year, he would receive back the amount expended by him for said fitting up said upper part of said building.

"4th. That at the time of the sale aforesaid the cost of fitting up said upper part of said building had not been agreed upon between the parties aforesaid, and it was then agreed upon by this plaintiff and defendant that defendant should take said upper part of said building off the hands of this plaintiff, and pay to this plaintiff, on or before the first day of January, 1888, the amount that should be agreed upon between said plaintiff and said John Breslin for so fitting up the same. It was also agreed that plaintiff should have the use and occupancy of the upper part of said building for such length of time as he desired, on condition that he pay rent to said defendant for whatever time he might occupy said premises on and after the 14th day of October, 1882.

"5th. That said plaintiff and said John Breslin afterwards agreed that the cost of fitting up said premises should be allowed in the sum of two hundred dollars, and said defendant was notified of said agreement, and payment of said sum was demanded of him. That the agreement herein mentioned between plaintiff and Breslin, in which plaintiff expended said sum of \$200 in fitting up said rooms, was considered in said trade as part of the contract between plaintiff and defendant, and the said \$200, the

cost of fitting up, was assumed by defendant and was to be paid to the plaintiff as a part of the consideration of his sale of his partnership interest as aforesaid. That plaintiff complied with all the terms of the agreement on his part to be performed, and offered to deliver possession of the said rooms to defendant.

"6th. That said defendant refused and still refuses to take said rooms and to pay said sum of two hundred dollars."

The defendant filed an amended answer to said petition as follows:

"1st. Denies each and every allegation contained in plaintiff's petition, except the allegations of partnership and sale of said business from plaintiff to defendant.

2d. Defendant, further answering, says that said plaintiff and this defendant were co-partners, doing business in Ponca, Dixon county, Nebraska, under the name of Connor and Hingtgen, and were engaged in the business of general merchandising at and prior to the time of the pretended agreement mentioned in plaintiff's petition; that at or about the said time said partnership was dissolved, and this defendant bought out the said plaintiff's interest in said business, that thereupon, in order to induce this defendant to agree to take the upper part of the building mentioned in his petition off of his (the said plaintiff's) hands, the said plaintiff did agree to and with this defendant to leave the town of Ponca, and especially not to engage in the business of merchandising against and opposition to said defendant in said town of Ponca. Defendant avers the fact to be that the agreement between himself and plaintiff was as follows: Defendant agreed to take said upper part of said building off of the plaintiff's hands, and to pay the said plaintiff for fitting up the same, on or before the 1st day of January, 1883, in consideration of the agreement then made to and with him by said plaintiff that said plaintiff would remove from said town of Ponca,

and would not again at any time engage in the business of general merchandising in said town of Ponca, where said defendant was and is still carrying on said business, and said agreement was entered into under no other consideration or for no other purpose whatever; and yet said plaintiff, wholly disregarding his said agreement, did at once enter into said business of general merchandising in said town of Ponca, in opposition to said defendant, and is now and ever since said time has been engaged in said business. Wherefore said defendant did refuse to take said upper part of said building off of said plaintiff's hands, and defendant never did take possession of the same, and defendant refused to pay said plaintiff the said sum of \$200, or any other sum whatever, on said account. Wherefore defendant prays that he go hence without day, and that he recover his costs herein most wrongfully sustained."

The reply is a general denial. On the trial of the cause the jury returned a verdict for the defendant, upon which judgment was rendered.

The principal defense of the defendant in this court is, that the contract for the upper rooms in the store building is separate from that for the purchase of the plaintiff's interest in the store, and the amount of the consideration being in excess of \$50, it is within the statute of frauds and void. There are other reasons assigned why this is a separate contract and within the statute of frauds, to which we need not refer.

It will be observed that the defendant, in his answer, admits that he purchased the plaintiff's interest in the upper part of said building. He states that he did so in consideration that the plaintiff would not engage in business in Ponca again. Whether such statement is true or not, it is practically an admission of the plaintiff's petition, and is sufficient to take the case out of the statute of frauds. The clear weight of testimony shows that the plaintiff proposed to sell the defendant his interest in the business, provided

he (the defendant) would purchase his interest in the upper rooms—that there was but one contract. The defendant, therefore, cannot by paying for the interest of the plaintiff in the store avoid liability on the remainder of the contract. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19	476
29	420
19	476
35	401
19	476
44	499
19	476
55	633

THE STATE OF NEBRASKA, EX REL. HENRY N. MOORE  
ET AL., V. CHICAGO, ST. PAUL, MINNEAPOLIS AND  
OMAHA R. R.

1. **Mandamus: DEMURRER.** Where it is sought to test the sufficiency of a petition for a mandamus, the proper course is to demur to the petition upon the ground that the facts stated therein do not entitle the relator to the relief sought.
2. ———: ———. Motion to quash for insufficiency, *Held*, To be a demurrer.
3. ———: **POWER OF RAILROAD COMMISSION.** The act of the legislature creating the railway commission, which took effect June 6th, 1885, gives such commission general supervision of all railroads operated by steam in this state, and requires them, among other things, upon a proper complaint being filed, to investigate the necessity for any addition or change of station houses or stations. A party, therefore, who requires the change, addition, or erection of a station, must secure the action of the commission before this court will grant a mandamus to compel a location. The case of *State v. E. V. R. Co.*, 17 Neb., 647, was instituted before the act creating the railroad commission took effect.

ORIGINAL application for mandamus.

*Beeson & Sullivan*, for the relator.



*Charles Ogden*, for the respondent.

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendant "to stop its trains, and to build a suitable depot, side tracks, switches, and cattle yards on its line of railroad at North Side, as shall reasonably accommodate the public, and conform to the requirements of the law," etc. The relators allege in their petition, in substance, that said railroad was completed in May, 1882, that at that time said corporation established a station on the west half of section 8 in township 25, range 2 east, for the purpose of receiving and discharging freight and passengers; that in 1884 said defendant erected at said station cattle yards and a chute for loading and unloading live stock, and also erected "a large section house and put up posts one mile from said station on the line of said railroad," with boards attached thereto, on which was printed in large letters the words "one mile to station;" "that ever since the completion of said road until quite recently respondent has stopped all its trains, both freight and passenger, at said station, at regular times, for the purpose of receiving and discharging freight and passengers and placed the name thereof on its time tables and maps with regular times for the arrival and departure of its trains;" "that the nearest station is Hoskins on the west, seven miles, and Wayne on the east, fourteen miles;" "that the country in the vicinity of said station is open prairie, very fertile and adapted to agriculture, and at the time of the completion of said railway was very sparsely settled;" that since the completion of said railway, and because of the establishment of said station, the relator Moore "purchased eight hundred acres coming within one-fourth mile of said station, and has put it all under cultivation;" that the relator Dodge purchased three hundred and twenty acres within one and a half miles thereof, and has

put it under cultivation and made it his permanent home; that "relator" Starr purchased one hundred and sixty acres within one mile thereof, and put it under cultivation and it is his permanent home, and about thirty other persons have also since the establishment of said station purchased and improved lands, and made permanent homes; that relators and said other citizens were induced to and did purchase and improve said lands and make their homes there, by the fact of the construction and operation of said railroad and the location of said station of North Side, and their belief that said station would be permanently maintained there; that at the time said station was located there were not to exceed twenty families located within a radius of seven miles thereof; that since the location of said station there have been established there, and are now in successful operation, a general store, a blacksmith shop, and lumber and coal yard, and a post-office, and a town has been laid off into lots, streets, and alleys, and the plat thereof duly recorded by the owners of the land; that from March, 1883, to about the first day of July, 1885; when said station was removed as hereinafter stated, there was shipped and unloaded at said station over respondent's railroad, in car load lots, about one hundred car loads of freight; during said time there was received and loaded at and shipped from said station about twenty-five car loads of freight, in car load lots, besides a large amount in quantities less than car load lots; but relators have no means of knowing or even approximating the amount; and large numbers of passengers arrived at and departed from said station over said road; but relators have no knowledge of the number of passengers thus carried over said road; that since the first of February, 1885, there has been shipped over said road for said town of North Side twenty-two car loads of lumber and other building material, and two car loads of coal; that during the time said station was maintained the business of said road to and from said sta-

tion was rapidly increasing, and if a station is continued there it will increase still more rapidly; that last spring the patrons of said station requested the respondent to erect a depot building at said station for the better accommodation of the shippers and passengers over said road; that respondent demanded as a condition of erecting a depot building or maintaining a station at North Side that a one-half interest in three hundred and twenty acres of land adjoining said station should be conveyed to them, and threatened that if their demands were not complied with that the station would be entirely removed, and trains would cease stopping there; that the owners of said land offered respondent a one-half interest in one hundred and sixty acres of said land as an inducement to erect a depot building and continue the station at North Side, but respondent refused to erect said depot building, or to continue longer to maintain a station or stop its trains at North Side, unless its demands for a one-half interest in said land was complied with, and because of the refusal of the owners of said land, who are non-residents, to comply with said demands, respondent removed said depot, side tracks, and stock yards as hereinafter stated; that about the first of July, 1885, respondent not regarding its duties as a common carrier, nor the rights of the relators and the public, and to avoid its duties as a common carrier, and for the reason that the owners of said land refused to donate land to them on which to lay out a town, respondent removed the side track, stock yards, and section house from North Side, and has ever since refused to receive or discharge freight at North Side, except in quantities less than car load lots, and is threatening to and soon will, if not prevented by order of this court, cease stopping any of its trains at said place; that since the removal of the depot from North Side respondent has put in a side track and stock yards and established a depot at a point on said railroad three and one-half miles east of North Side, and re-

He moved the section house from North Side to said point, and stops its trains and delivers and receives freight there in any quantities desired. There is no settlement or improved land nearer than five miles to the north or south of said new station, and the nearest house on the east is at least three miles distant, and only two houses between it and North Side on the west. There are only ten persons who will be as well accommodated with a depot at the new place as at North Side, and five of them are as convenient to North Side as to the new station. There is no business of any kind established at the new station, but respondent is making strong efforts to induce the parties who are doing business at North Side to move to said new place, by offering to move their goods and buildings free of charge, and to indemnify them against loss by the removal. Respondent is also endeavoring to procure the removal of the post-office from North Side to said new station. The relators further state that there are large amounts of freight that must be shipped over respondent's railroad for relators and other residents and citizens of North Side and vicinity; that relator Moore now has about four hundred head of cattle, and about five hundred head of hogs, and about twenty-five thousand bushels of corn, all of which he desires to ship to market over respondent's railroad, and relators Dodge and Starr also have large amounts of stock and grain to ship over said road, as have all the other citizens at and in the vicinity of North Side, and it is essential to the business of the relators and other citizens that large quantities of freight should be shipped to said station, such as lumber, lime, coal, agricultural implements, dry goods, groceries, household goods, stock, and a great many other things that are essential to every community; that prior to the commencement of this action the relators and other parties equally interested requested respondent to put in a side track and give the necessary and proper facilities for doing business over said road at North Side, which re-

spondent utterly refuses to do; that by reason of the removal of said station, and the refusal of respondent to receive or discharge freight at North Side, relators and a large number of other persons are prevented from enjoying the same privileges and accommodations over respondent's railroad as are persons at other points on the line of said railroad, who are engaged in the same business, whereby they will be put to great expense and inconvenience in the transaction of their business; that men of capital have since said town was laid out at North Side come there for the purpose of investing money and going into business, but on learning that the depot was about to be taken away and trains to cease stopping there, they abandoned the idea and declined to invest money there; that the trade, commercial, and agricultural interests of that portion of the country that would be better accommodated at North Side than at any other station on said road are sufficient to support a town of three or four hundred inhabitants; that at the new station there is no depot building, nor other place to store goods for shipment over said road, nor any one there to look after or care for goods shipped to or from said station; that by reason of a depot being located as aforesaid at North Side, they and about thirty other persons, who purchased land in the vicinity thereof, were compelled to and did pay a higher price for their land than they could have bought as good land for as near the line of said railroad where there was no depot, and that if said depot is not re-established their land will be diminished in value in consequence thereof from three to five dollars per acre.

"Relators allege that the respondent, in the proper exercise of its franchises, is bound to so conduct its business as to accommodate the public along the line of its road, and to that end to stop its train of cars for the receipt and discharge of passengers and freight, and to build the necessary depots, switches, side tracks, and stock yards for the accommodation of business at centers of trade and popu-

lation through which its line of road passes, and that by reason of respondent's refusal to establish a depot and to stop its trains at North Side, and by establishing a depot and stopping its trains at said new station, respondent is discriminating against North Side and in favor of said new station. Relators further state that about nine-tenths of the freight shipped to and from the new station is shipped by or to the patrons of North Side, and has to be transported the three and one-half miles by wagon at a great increase of cost and inconvenience; that they, together with others equally interested in the matter, applied by petition to the board of railroad commissioners for relief in the premises; but said board neglects and refuses to grant any relief or to take any action whatever in the matter."

The defendant now moves to quash the petition upon a number of grounds, which in effect are, that the petition does not state facts sufficient to entitle the relators to the relief sought. The proper practice in such case is not to quash the petition or affidavit on which the writ is sought, but to demur for some of the causes stated in the code. *Long v. State*, 17 Neb., 60-68. Mandamus is not a prerogative writ in this state, but a remedy given to the citizen to enable him to assert his rights and obtain justice. *State v. Lancaster County*, 13 Neb., 223. *Com. v. Dennison*, 24 How., 97. High on Ex. Rem., § 8. Maxw. Pl. and Pr. (4th ed.), 729. Hence the ordinary rules of pleading, where there are no special provisions of the statute to the contrary, apply to proceedings by mandamus. The motion in this case, however, will be treated as a demurrer that the facts stated in the petition do not entitle the relators to the relief sought.

At the last session of the legislature an act was passed "to provide a board of railroad commissioners, to define their duties, and to provide for their salaries," etc. Comp. Stat., chap. 72, art. VIII. Sec. 2 of the act provides that, "said commissioners shall have the general supervision of

all railroads operated by steam in this state, and shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agents, or employes thereof; and shall also from time to time carefully examine and inspect the condition of each road in the state, and equipments, and the manner of its conduct and management with reference to the public safety, interest, and conveniences. Whenever in the opinion of the railroad commissioners it shall appear that any railroad corporation fails in any respect or particular to comply with the terms of its charter or the laws of this state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition or *change of its station houses or stations*, or any change in mode of operating its road or conducting its business is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, said railroad commissioners shall inform said railroad corporation of the improvements and changes which they adjudge to be proper, by notice in writing, to be served by leaving a copy thereof, properly certified, with any station agent, treasurer, superintendent, or director of said corporation, and a report of such proceedings shall be included in the annual report of the commissioners to the governor, who shall transmit the same to the legislature. Nothing in this section shall be construed as relieving any railroad corporation from its present responsibilities or liabilities for damage to person or property."

It will be observed that the statute gives the board "general supervision of all railroads operated by steam in this state," and provides that when "any addition or change of its station houses or stations" \* \* in order to promote "the security, convenience, and accommodation of the public," are required, the board shall serve a notice in writing on the corporation of the improvements and changes *which they adjudge to be proper*, etc. Here is a

plain and apparently an adequate remedy at law that did not exist when the case of *State v. Republican Valley R. R. Co.*, 17 Neb., 647, was instituted.

The 10th section of the act provides in effect that a complaint under oath shall be made to the board, setting forth the grievance complained of. Thereupon, if the board upon investigation shall believe that there is probable cause for such complaint they shall notify the corporation of the matter of which complaint is made and suggest what action should be taken in the premises. These provisions, in connection with section 75 of chap. 16 of the Comp. Statutes, empowering the corporation to establish such offices and depots as may be *necessary* between the places of termini of the road, would seem to place the location and change of stations very largely under the control of the board. Here is a special tribunal created for the very purpose of exercising jurisdiction in such cases, and its powers must be exhausted before this court would be justified in interfering. If, when a proper petition is presented to the board requesting it to act on any matter of which it has cognizance, and it refuses to take action thereon, this court, upon the proper application, will require it to proceed and determine the matter in controversy. The allegations in the petition as to the complaint presented to the board are entirely insufficient to show that it was the duty of the board to act on such complaint. If a proper complaint is presented to such board there is but little doubt that it will take the necessary steps to investigate the case, but if it should fail to do so, the court on a proper application will compel it to act.

As the petition fails to show that the relators are entitled to the relief sought at the hands of this court the writ must be denied.

WRIT DENIED.

THE other judges concur.



ORAN D. THATCHER ET AL., APPELLANTS, V. THE  
COUNTY OF ADAMS, APPELLEE.

1. **School Districts: INDEBTEDNESS WHEN DISTRICT SUBDIVIDED.** Where a school district issued its bonds for the purpose of borrowing money, and afterwards was subdivided into other districts, it is the duty of the taxing officers to levy taxes on the property of the original district sufficient to pay the indebtedness, but they have no power or authority to levy such taxes on real estate which had never constituted a part of the district, nor upon personal property outside of such district.
2. ———: **TAXES: INJUNCTION.** Such taxes, if levied, would be for an "unauthorized purpose," within the meaning of section 144 of chapter 77 of the Compiled Statutes, 1885, and their collection might be restrained, or the creation of an apparent lien therefor prevented, by an injunction.
3. **Mandamus.** A writ of mandamus can only require an officer, board, or court to perform a duty which the law enjoins. It cannot create or enlarge the authority of the person or officer to whom it is directed.

APPEAL from the district court of Adams county.  
Heard below before MORRIS, J.

*Hester & McCreary*, for appellants.

*L. J. Capps*, for appellee.

REESE, J.

Plaintiffs filed this petition in the district court, alleging, in substance, that the county board, on the 12th day of June, 1885, ordered a tax of twenty-one mills to be levied upon their separate property situated in sections 24, 25, and 36, in town 7, range 10, in Adams county; that the indebtedness for the payment of which the levy was made was a debt of school district No. 13 of said county, but that the said three sections were never within said district,

19	485
30	884
19	485
44	489
19	485
49	618
53	170
53	880

were in no way liable for its debts, and that the county board had no authority to levy such tax upon the property described. An injunction is prayed to restrain the county clerk from transcribing the levy onto the tax lists, and thereby casting a cloud upon the title of the real estate of plaintiffs.

To this petition a general demurrer was filed, which was sustained, and to which plaintiff excepted and now appeals, for the purpose of securing a review of the decision of the district court in sustaining the demurrer.

The abstract of the petition is incomplete, but enough is shown from which we conclude that the levy was made for the purpose of raising sufficient funds to pay certain bonds issued by said school district No. 13.

It is conceded by defendant that if the property described in the petition was not a part of school district No. 13 at the time the bonds were issued it could not be taxed to pay the debt, but it is contended that injunction will not lie to restrain the clerk from transcribing the tax onto the tax lists, the plaintiffs having an adequate remedy at law under the provisions of section 145 of chapter 77, Compiled Statutes. It may be that a remedy is given by the section referred to, but that it is *adequate*, we think could not be contended. Section 144 of the same chapter prohibits the granting of injunctions to restrain the collection of taxes, except in cases where the tax has been levied for an "illegal or unauthorized purpose." In such cases the collection of a tax may be restrained by injunction. It would seem to follow, logically, that if the *collection* of a tax might be restrained, then the same remedy would exist to prevent the creation of a lien or cloud upon real estate, and the title thereto, by placing the tax upon the record books of the county and ordering its collection. Assuming the allegations of the petition to be true, as we must when assailed by a demurrer, the question presented is, was the tax levied upon the property of plaintiffs so

levied for an unauthorized purpose? We think it must be conceded that it was. If the property was not liable for the debt the county board had no authority to make it so. As well might the tax have been levied upon any other property in the county as upon the property of plaintiffs. The county board had no authority to levy the tax upon any real estate except what was included in district 13 at the time the debt was contracted. The petition, therefore, stated a cause of action, and the demurrer was improperly sustained.

Counsel have gone beyond the allegations of the petition as contained in the abstract and discussed another question, to which we will briefly refer.

It appears by the records of this court that on the 31st day of July, 1883, a peremptory writ of mandamus was issued to require a levy of tax to be made upon the property within the district as constituted at the time the bonds were issued, and that the sections above named were enumerated as having been a part of said district at that time. No opinion seems to have been filed, and the case is not reported. An examination of the files in that case shows that these plaintiffs were not parties in that action.

All that could have been and all that was judicially settled by that judgment was to require the officers of the district to perform a duty imposed upon them by law. Nothing was or could have been required except that the officers do what it was their duty to have done without the writ. They were not authorized to levy a tax upon any property outside of the original boundaries of district No. 13. The writ of mandamus could give no greater authority than they had without it. Had it been made to appear to this court prior to the issuance of the writ that the land described in plaintiff's petition, or any other, was not within the bounds of district No. 13 when the bonds were issued, such lands would not have been included. Plaintiffs, not having been made parties thereto, are not bound by any

judgment in that case. While this question could not legitimately arise upon demurrer, the fact of a former adjudication being proper matter of defense, yet in view of the discussion of the subject by counsel in their briefs and of the further fact that the cause must be remanded for further proceedings, we have deemed it proper to say that in our opinion the mandamus could give no authority to levy a tax upon property not liable for the debt, and that the judgment of this court in issuing the writ can in no sense be deemed an adjudication of plaintiff's rights, nor deprive them of any remedy which they would have had in case the levy had been made without coercion by a mandamus. If, therefore, the plaintiff's property was not within the boundaries of district No. 13 as it existed at the time the debt was contracted they are entitled to the relief prayed.

The decision of the district court in sustaining the demurrer is reversed, the demurrer overruled, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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19 488  
38 574

JOHN SAXON, PLAINTIFF IN ERROR, V. W. R. CAIN,  
ADMINISTRATOR OF THE ESTATE OF JAMES COT-  
TRELL, DECEASED, DEFENDANT IN ERROR.

1. **Evidence: PRESUMPTIONS.** It is a rule of law that every presumption is in favor of the correctness of the decisions of courts of general jurisdiction until the contrary is made affirmatively to appear.
2. **Administration of Estates: CONFIRMATION OF SALE.** In proceedings for the confirmation of a sale made by an administrator upon a license previously granted it is the duty of the

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Saxon v. Cain.

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court to confirm the sale and order the execution of conveyances to the purchaser, if it appears that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property. Sec. 88, chap. 23, Comp. Stats.

3. ———: **WAIVER BY ADMINISTRATOR.** When an administrator makes application for a license to sell real estate, and a sale is awarded to the extent of an undivided seven-eighths interest, and he accepts such order as final and proceeds to sell the seven-eighths, reports the sale, and procures a confirmation thereof by the district court, he thereby waives his right to have the order reviewed by proceedings in error.

ERROR to the district court for Richardson county.  
Heard below before MORRIS, J.

*John Saxon, pro se.*

*E. W. Thomas and A. J. Weaver, for defendant in error.*

REESE, J.

This was an application made to the judge of the district court by an administrator for a license to sell real estate of a decedent for the purpose of paying debts against the estate.

The application alleged that James Cottrell, the deceased, died on the 27th day of November, 1880, in Brown county, Kansas, being the owner of real and personal estate both in Kansas and in this state; that he died intestate, leaving surviving him a widow and a number of heirs, whose names and ages are given; that at the time of his death he was engaged in business somewhat extensively in Falls City, in this state, and the owner of real and personal property in Richardson county of considerable value, and was largely indebted in said county; that on the 17th of January, 1881, upon the application of the widow, Silas Romesburg, a son-in-law of deceased, was appointed administrator of said estate by the county court of

Richardson county, and took charge of assets to the amount of \$8,023.34, but that in May, 1882, upon complaint of one of his sureties, charging gross mismanagement and misapplication of the funds, Romesburg was removed for cause, the charge having been found to be true. In October, 1882, the applicant was appointed administrator to succeed Romesburg, and entered upon the discharge of his duties, but from the confused condition of the estate, the litigation in which he had been engaged in trying to collect apparent assets, the settlement of the estate had been delayed and he had only been able to collect the sum of \$500, and that all the estate which had come into his hands amounted to \$1,126.57; that he had paid debts until the amount remaining in his hands was \$496; that claims had been allowed against the estate to the amount of \$3,329.92; that Silas Romesburg had paid thereon the sum of \$893, leaving unpaid about \$2,538.92 of said debts; that the misapplication of the funds by Romesburg was so reckless that the whole of the estate which went into his hands, excepting the amount reported as stated above, was lost without any fault of the creditors whose claims had been allowed, and the said Silas Romesburg and his sureties on his bond were at the time of making the application absolutely worthless, and any effort to collect would be a waste of time and the money of the estate; that the real estate was in the possession of the administrator and had never been apportioned nor divided among the heirs, nor encumbered by them, except the conveyance of one-eighth interest by one to John Saxon. The real estate of the deceased is described, and it is alleged that it is necessary to sell the same to pay the debts.

At the time fixed for hearing the application, John Saxon, representing his one-eighth interest, appeared and demurred to the petition. His demurrer was sustained, and no one else appearing to resist the application the order was made authorizing the administrator to sell seven-eighths,

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Saxon v. Cain.

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undivided, of this estate. The applicant, although excepting to the order sustaining the demurrer, proceeded to sell the interest as ordered. After sale, and upon the report of the administrator, the said Saxon, the purchaser of the seven-eighth interest of part of the property sold, appeared and sought to resist the confirmation of the sale made to himself and other purchasers. The sale being confirmed, he alleges error.

The principal contention is, that the court had no jurisdiction to grant the license, because the time allowed by statute within which an administrator could dispose of the estate and pay debts had expired before the application was made.

By section 245 of chapter 23 of the Compiled Statutes, it is provided that the county court may, upon the application of an administrator, extend the time for paying debts so that the whole time allowed the original administrator shall not exceed three years. By section 247 it is provided that, when necessary, the time in which a new administrator can pay debts and legacies may be extended in like manner and upon a like notice as required in the case of an original administrator. There was not three years intervening between the appointment of the new administrator and the application for the license, nor even the filing of the report of the sale by the administrator. There is no bill of exceptions showing what, if any, evidence was presented to the judge of the district court when the license was granted, and we must presume the proceedings were regular and that he had before him such evidence as was necessary to authorize him to make the order. Jurisdiction of the matter in the county court had not been lost and we cannot presume that court had failed to discharge its duty over which it is conceded it had obtained jurisdiction. All presumptions are in favor of the regularity of its proceedings as well as of those of the district court. *White v. Rourke*, 11 Neb., 521. *Roehl v. Roehl*, 15 Id., 655.

As to the order of the court confirming the sale, little need be said. Section 88 of the chapter above referred to provides that, "If it shall appear to the district judge that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold \* \* \* he shall make an order confirming such sale and directing conveyances to be executed." So far as the record discloses no objection was made to the manner in which the sale was conducted, and we presume none existed.

Defendant in error has filed a cross petition in error, alleging error in the district court in sustaining the demurrer of John Saxon to his application for license, so far as the application applied to the one-eighth interest of Saxon. Since he acquiesced in the order and accepted a license to sell, and did sell the seven-eighths, and thus accepted the order as made, he cannot now question the decision of the court. *Hamilton County v. Bailey*, 12 Neb., 56.

The order of the district court confirming the sale is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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CHRISTOPHER TIERNAN, PLAINTIFF IN ERROR, V. DORAN  
& HOLMES, DEFENDANTS IN ERROR.

**Partnership: ACTION FOR SERVICES.** When a firm or partnership is engaged in business, and services are rendered by them for another upon request, although outside of their regular business, by which such other is benefited and the firm is damaged, such firm can recover the amount due them by action in their partnership name.



ERROR to the district court for Lancaster county. Tried below before POUND, J.

*James E. Philpott*, for plaintiff in error.

*Caldwell & Christy*, for defendants in error.

REESE, J.

Defendants in error instituted this action, claiming the sum of eight dollars as due them upon the following causes of action, viz.: Four dollars for herding and feeding two head of cattle from the 15th of September, 1882, until the 15th of November following, and four dollars for time expended in hunting for said cattle, they having been taken out of their herd by plaintiff in error without their knowledge, and they believing they had escaped from the herd and strayed away. The verdict of the jury in the district court was for the sum of four dollars. The action was brought in the name of Doran & Holmes, as plaintiffs. The first question presented is, that Doran & Holmes was a partnership engaged in the dairy business, but not in the business of herding cattle, and that the services were not rendered by the firm as such firm. The testimony shows that they were engaged in the dairy business as claimed by plaintiff in error and were not engaged in herding cattle. It is also shown that the herd in which the cattle were kept, as well as the pasturage and feed, belonged to the firm. It would therefore follow that the compensation would go to the firm. But no question of this kind is raised by the pleadings. The answer "admits that plaintiff kept two calves in his herd for about the period of forty-five days, that the service of keeping and pasturing the same were reasonably worth the sum of two dollars," and pleads payment of that sum to the agent of defendants in error. The testimony as to the value of the service as rendered was conflicting.

The jury could, and perhaps did, find that the pasturage and feed alone were worth the amount named in the verdict.

The bill of exceptions in this case consists of the testimony of eight witnesses, besides the parties to the suit, and is contained in twenty-three pages of the record. It is to be presumed, although not shown by the record, that about the same number of witnesses were examined on the trial before the justice of the peace. Yet we find a judgment against plaintiff in error for \$214.48 costs. It is deemed proper to call the attention of counsel to this very extraordinary judgment, with the suggestion that it *appears* to be entirely beyond reason, and that the matter should be investigated in the district court.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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THE STATE OF NEBRASKA, EX REL. C. H. LINDBURG,  
V. GEORGE GROSVENOR.

1. **SCHOOLS: TEACHER'S CERTIFICATE GOOD IN ANOTHER COUNTY.**

Where the county superintendent issues a certificate authorizing the person named therein to teach school in such county, the county superintendent of any other county may endorse such certificate, which will render the certificate valid in the county where endorsed for such time as the superintendent shall determine, not to exceed two years nor longer than the certificate was originally intended.

2. **—: CERTIFICATE CANNOT BE ATTACHED COLLATERALLY.**

A certificate being issued or endorsement made thereon by the officer specially authorized to make the same, it is presumed to be valid; and in the absence of fraud is not subject to attack collaterally.

3. ———: REFUSAL OF TREASURER TO PAY TEACHER'S WAGES.  
Where a teacher when employed by the director and moderator of a school district, and while teaching such school, possessed a certificate duly endorsed by the county superintendent, *Held*, That the treasurer of the district, in the absence of fraud, could not refuse to pay a warrant drawn by the director and moderator for the teacher's wages, upon the ground that the endorsement was invalid.

ERROR to the district court for Polk county. Tried below before NORVAL, J.

*J. W. Edgerton*, for plaintiff in error.

*E. L. King* and *G. M. McConaughy*, for defendant in error.

MAXWELL, CH. J.

The defendant is treasurer of school district No. 74 of Hamilton county, and this action was brought in the district court of Polk county to compel him to pay an order drawn by the director of said district for the sum of \$120 in favor of the relator, which order was countersigned by the moderator. On the trial of the cause judgment was rendered in favor of the defendant.

The testimony tends to show that on the 19th of January, 1884, the county superintendent of Polk county gave the relator a second grade certificate for eight months; that on the 9th of December following the county superintendent of Hamilton county endorsed said certificate for a period of four months; that the relator presented said endorsed certificate to the director and moderator of school district No. 74 of Hamilton county, and was employed by them to teach said school for sixty days from the 15th of December, 1884, for the sum of \$120; that soon after the relator commenced teaching the defendant asked him for his certificate, which the defendant examined, and expressed

the opinion that it was of no validity after the 19th of January, 1885. Upon the completion of the term of school the director gave the relator an order on the treasurer for the sum agreed upon, which order was countersigned by the moderator. This order was presented to the defendant, who paid thereon the sum of \$12. Afterwards he paid thereon the sum of \$30, and refused to pay the balance, apparently upon the ground that the relator was not a qualified teacher.

The principal object of the statute in requiring teachers to possess a certificate authorizing them to teach school for specified periods, is to secure persons of good moral character, skilled in the branches specified in the statute, and with ability to teach. The statute provides for a county superintendent for each county, and authorizes him to grant for his county certificates to teachers, divided into three grades. It also authorizes such superintendent to endorse a certificate in force in this state or any other state without examination, and such endorsement will render the certificate valid. Comp. Stat., ch. 79, subd. VII. If a candidate has passed a satisfactory examination in another county or state, and has received a certificate authorizing him to teach therein, it is but reasonable to suppose that he will pass a like examination in any other county or state where the requirements of the statute are substantially the same. It is not compulsory on the superintendent, however, to endorse the certificate but he may require an examination. Where, however, he does endorse such certificate the effect is precisely the same as if he had issued a certificate himself, and so long as such endorsement remains in force the person endorsed is authorized to teach the same as if a certificate in due form had been issued to him. And such endorsement during the time for which it was granted is valid, unless set aside for some of the causes that would authorize the revocation of a certificate. It is, in fact, a certificate issued by the officer whose duty it is to grant

State v. Skirving.

the same upon being convinced that the applicant possesses the necessary qualifications. In the absence of fraud a certificate or endorsement thereon is not subject to collateral attack and can only be set aside for cause. The relator, therefore, was a qualified teacher during the entire period that he taught school in district No. 74, and was entitled to be paid for his services. "The laborer is worthy of his hire."

The judgment of the district court is reversed and a peremptory writ will be awarded in this court for the unpaid balance and interest thereon.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	497
96	390
19	497
31	90
19	497
46	682

THE STATE OF NEBRASKA, EX REL. THOMAS MALLOY,  
V. JAMES SKIRVING.

1. **County Commissioner: RESIDENCE.** A county commissioner must continue to reside in the district in and from which he was elected, and his removal from the district, although he remains in the county, vacates the office.
2. ———: **VACANCY: NOTICE OF ELECTION.** Where a vacancy occurs in the office of county commissioner more than thirty days before a general election, it is to be filled thereat; and the failure of the county clerk to call attention to such vacancy in the election notices posted by him, where the fact is generally known and acted on by the voters of the county, will not invalidate the votes cast to fill said vacancy.

INFORMATION by *quo warranto*.

*Utley & Small*, for relator.

*James Skirving*, for respondent.

MAXWELL, CH. J.

This is an action of *quo warranto*, which is submitted to the court on the following stipulation of facts:

1st. That at the general election in November, 1884, the defendant was duly elected to the office of county commissioner of Holt county, and when so elected he was residing in and was elected for the second commissioner's district of said county.

2d. That in January, 1885, at the time required by law, said defendant gave the bond and took the oath required by statute, "and at once began to perform the functions of said office and continued to so perform the functions of said office, and did use said office and the functions thereof until on or about the 25th day of March, 1885, when the said James Skirving removed from said 2d commissioner's district in said Holt county into the 3d commissioner's district in said Holt county, and has since said date resided and made his place of abode in said 3d commissioner's district, and has continued all the time to use and exercise the functions of said office, and does now exercise the same.

That on the 14th day of September, 1885, the county clerk, county judge, and county treasurer of Holt county were duly notified of the facts hereinabove set forth, and that it was claimed from the existence of said facts that a vacancy existed in the office of county commissioner of said 2d commissioner's district of said Holt county, and said officials were requested to fill said vacancy by appointment, but failed to act in the premises.

3d. Upon the day of the holding of the general election for and in the state of Nebraska, in the month of November, 1885, Thomas Malloy, relator, was a citizen of the United States and an elector and resident of the 2d commissioner's district in Holt county aforesaid, and then had and now has all the qualifications required by law to hold the office of commissioner of said 2d commissioner's district.

4th. That about one month previous to the holding of the general election of the state of Nebraska held in the month of November, 1885, the republican party in the county of Holt, in the state of Nebraska, at a regular republican convention, nominated Thomas Malloy, relator, as candidate for the office of county commissioner of said 2d commissioner's district in said Holt county, to fill the so claimed vacancy caused by the removal of said James Skirving aforesaid from said 2d commissioner's district as above set forth; and two or three days thereafter the democratic party of the county of Holt, in convention assembled, nominated John Cronin as candidate for the office of county commissioner of the said 2d commissioner's district of Holt county, to fill the claimed vacancy caused by the removal of said James Skirving, defendant, from said 2d commissioner's district, and it became generally known throughout the county of Holt that said Thomas Malloy and John Cronin were candidates for the office of county commissioner of said 2d commissioner's district upon the republican and democratic tickets respectively as above set forth, and said candidates were voted for at said general election held in the month of November, 1885, for the election of officers in the state of Nebraska, and said Thomas Malloy received for the office of county commissioner of said 2d commissioner's district 1,465 votes, and said John Cronin received for the office of county commissioner for said 2d commissioner's district 1,276 votes, and F. O. Smith received for said office 248 votes, and the election returns of said election held in the various election precincts in and for said Holt county were duly returned to the county clerk of Holt county, and were duly canvassed by a duly constituted board of canvassers of said Holt county; and the said Thomas Malloy was found to have received a majority of the votes cast for the office of county commissioner of said 2d commissioner's district, and afterwards, on the 18th day of November, 1885, the county clerk of Holt county issued

to said Thomas Malloy a certificate of his election to said office of county commissioner," and afterwards, to-wit, on the 25th day of November, 1885, said Thomas Malloy filed his bond as commissioner elect of said Holt county to fill the vacancy hereinabove described, and said bond was duly approved by said county judge, and said Thomas Malloy took the oath of office as commissioner elect in and for the 2d commissioner's district of said Holt county, and thereafter, to-wit, on the 30th day of November, 1885, the said Thomas Malloy, duly qualified as commissioner elect of said Holt county, did assemble with Joseph E. West and George Bastedo, county commissioners of said Holt county, said James Skirving being also present and acting as commissioner by virtue of his election as above described, at the office of the county commissioners of said Holt county, in O'Neill, the county seat of said Holt county, and did there claim a seat with said county commissioners as a member of the board of county commissioners of said Holt county, but the said board and the said James Skirving did refuse to permit said Thomas Malloy to have a seat with said board and hold the same, the said James Skirving as claimed by said Thomas Malloy, and excluded said Thomas Malloy from said seat, and prevented said Thomas Malloy from exercising the functions of said office and from representing said office, and still refuses to permit said Malloy to have a seat with said county board and in any manner to exercise the functions of said office, and the said James Skirving still holds said seat with said county board, and exercises and uses the functions of the office of county commissioner of the said 2d commissioner's district in and for the said county of Holt, and will not permit the said Thomas Malloy to exercise the functions thereof.

5th. That the county clerk in the election notice given of the offices to be filled at the general election held in Holt county in the month of November, 1885, for the election of the offices to be filled in said Holt county, did not state



in said notice that a vacancy existed in the office of county commissioner in said 2d commissioner's district, and did not notify the electors of said Holt county that a candidate for the office of commissioner in said 2d commissioner's district would be voted for at said election.

6th. That the highest number of votes cast for any office in said Holt county at said general election was 3,124 votes.

There are other stipulations as to the effect of the agreement herein, etc., to which it is unnecessary to refer.

Two questions are presented by the record. *First.* Did the removal of the defendant from the second commissioner's district vacate the office. *Second.* If so, was the relator properly elected to said office?

In determining the first question but little aid can be obtained from adjudged cases. It is one that rests entirely upon the construction to be given to the various provisions of our statutes relating to the subject.

Section 53 of chapter 18, Compiled Statutes, provides that, "the board of county commissioners shall consist of three persons. They shall have the qualifications of electors and shall be elected in their respective districts at the annual general election."

Section 54: "Each county shall be divided into three districts, numbered respectively one, two, and three, and shall be composed of two or more voting precincts, comprising compact and contiguous territory and embracing as near as may be possible one-third of the population of the county, and not subject to alteration oftener than once in three years, and one commissioner shall be elected from each of said districts by the qualified voters of the whole county, as hereinbefore provided. The district lines shall not be changed at any session of the board unless all of the commissioners are present at such session."

Section 101 of chapter 26 provides that, "every civil office shall be vacant upon the happening of either of the

following events at any time before the expiration of the term of office as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. 5. His ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to be exercised or for which he may have been elected," etc.

The defendant admits that a party elected county commissioner must be a resident of the district when the election takes place, but he contends that as the duties of the office can be performed only at the county seat, and are not to be performed in the district for which he was elected, unless the county seat is in that district, that therefore a removal from the district does not vacate the office. He claims that the word "district," following as it does the word "state," in section 101 of chapter 26, refers to subdivisions larger than a county and not to the subdivisions of a county. Webster defines the word district as "a defined portion of a state or city for legislative, judicial, fiscal, or elective purposes." It may comprise territory of greater extent than a county, as a judicial district, etc., or may contain but a small portion of the territory of a county or city, as a school district. A reasonable construction of the statute would seem to be that where it requires a party when elected to be a resident *in* the district, and that one commissioner shall be elected *from* each of the commissioner's districts, and declares the effect of removal from the district to be to vacate the office, to hold this applies to all cases where the officer has ceased to be a resident of the district in which the duties of his office are to be exercised, or for which he may have been elected. If this were not the law each county commissioner upon being elected could remove to the county seat, and each member of the legislature remove to the capital of the state, etc. The object of the legislature in enacting this

provision no doubt was to secure as far as possible to all parts of a county fair representation on the board of county commissioners, by the selection of members whose residence and interests were in the district where each was elected, and as they are required to reside in various parts of the county they may be supposed to labor for the best interests of the entire county and not for any particular locality. The case is not materially different from the wards of a city. Councilmen are chosen from each of the wards, who have no power except as members of the council, and none of the duties of their office may perhaps be performed in the ward for which they were chosen, yet if one removes from the ward where he was elected the office becomes vacant. The act creating the board of county commissioners for each organized county was passed in 1855-6, more than thirty years ago, and the construction placed upon that act from the time of its passage till now has, so far as the writer is aware, been that a county commissioner must continue to reside in the district in and for which he was elected, and that his removal therefrom vacated the office.

We are referred to *State v. Board of Supervisors*, 21 Wis., 449, and *Smith v. State*, 24 Ind., 101, as holding a contrary view. We have examined those cases and do not think they are applicable under our statute. We therefore hold that the defendant by removing from the second district vacated the office held by him of county commissioner.

2. The right of relator to the office in question. It will be seen from the admitted facts that the relator received 1,465 votes, John Cronin 1,276, and F. O. Smith 248 for said office, the aggregate of which is 2,989 votes, and that the highest number of votes cast for any office in that county at that election was 3,124. This shows that it was generally understood in that county that a vacancy existed, and that the candidates named were balloted for to fill said office.

Section 107 of chapter 26, Compiled Statutes, provides that, "vacancies occurring in any state, judicial district, county, precinct, township, or any public elective office thirty days prior to any general election shall be filled thereat," etc.

As from the agreed statement of facts, it appears that the defendant removed from the second district in March, 1885. Being more than thirty days prior to the election, it was the right and duty of the electors of said county to fill the vacancy at said election, and the exercise of this right does not depend on the notice or want of it of the county clerk. In deciding this, however, we do not intend to go beyond the facts in this case. Here it seems to have been generally understood by the electors of the county that a vacancy existed, and they sought to fill said vacancy, nearly all those voting at that election casting their ballots for one of the candidates named.

This, we think, was sufficient to show that the election was general and participated in by all the electors who desired to vote upon that question. What the rule might be, had but a small percentage of the voters participated in the election, is not before the court.

It is clear that the relator is entitled to the office of county commissioner for the second district of Holt county. It is therefore considered that the defendant be ousted from the office of county commissioner of the second district of Holt county, and that the relator be instated therein.

**JUDGMENT ACCORDINGLY.**

**THE other judges concur.**

**BENJAMIN W. RIDDLE, PLAINTIFF IN ERROR, V. ARTHUR  
PERRY, DEFENDANT IN ERROR.**

1. **Wager: DEMAND FROM STAKEHOLDER.** Where a wager is illegal either party may claim the money deposited by him, from the stakeholder, even after the wager is decided against such party, provided the demand is made before the money is actually paid to the winner.
2. ———. If the money was actually paid by the stakeholder to the winner before notice or demand of the loser he will be exonerated.
3. ———: **CRIMINAL LAW.** Section 214 of the criminal code does not apply to a mere stakeholder who has taken no part in the illegal transaction.

**ERROR** to the district court for Saunders county. Tried below before **POST, J.**

*N. H. Bell* and *L. C. Burr*, for plaintiff in error.

*S. H. Sornberger* and *J. R. Gilkerson*, for defendant in error.

**MAXWELL, CH. J.**

In November, 1884, the plaintiff brought an action against the defendant in the district court of Saunders county, the cause of action being stated in the petition as follows:

"Plaintiff placed in the hands of the defendant the sum of \$200, which the defendant was to hold and pay to the winner of a certain horse-race, which was to be run by a horse owned by this defendant and one owned by one Chollette. That before the defendant had paid over the money to the winner, Chollette, the plaintiff demanded of the defendant that he, the defendant, return the money to plaintiff. That the defendant refused to pay the money to

the plaintiff, and this action is brought to recover the said sum of \$200 and interest thereon from the 15th day of November, 1883, and costs of suit."

## ANSWER.

"Defendant admits that he received the money from the plaintiff, to be paid out as stated in the petition, but says that before demand had been made on him by the plaintiff that he had paid over the same to the man Chollette, as the winner of the race."

On the 20th day of May, 1885, the case came on for trial before the court and jury, who found, specially, that "the defendant paid the \$200 to Courtier before the plaintiff demanded the same of the defendant," and found generally for the defendant.

After the evidence was submitted, and the arguments made, the plaintiff asked the court to instruct the jury as follows:

"The court instructs the jury that if you find from the evidence and pleadings the plaintiff and one J. C. Courtier, together with the defendant, on or about the 15th day of November, 1883, made a bet of \$200 each, upon the speed of certain horses, and the said plaintiff and the said Courtier deposited \$200 each with the said defendant, and that certain persons were chosen to judge of said race, and report the result to the defendant, as stakeholder, and thereupon the money should go to the winner, and you find from the evidence and pleadings that in pursuance of such a bet, said race took place and said money was deposited with the defendant, and, as such stakeholder, defendant has paid said \$200 of the plaintiff's money to the said Courtier, then, under section 214 of the criminal code of the statutes of Nebraska, and the law, the defendant is liable, and your verdict must be for the plaintiff in the sum of \$200 and interest at the rate of 7 per cent from the 15th of November, 1883.

"3d. The jury are further instructed that if you find from the evidence that the defendant, knowing that the plaintiff did not wish to carry out said bet, and learning in any way that the plaintiff was doing all he could to prevent the defendant from delivering the said \$200 to said Courtier, yet, notwithstanding such knowledge on the part of the defendant, the defendant by any trick or device (if any you find from the evidence) wrongfully delivered said money to the said Courtier, against the wishes and protest of the plaintiff, then you must find for the plaintiff in the sum of \$200 and interest from the 15th day of November, 1883."

The court refused to give the above instructions, and the plaintiff at the time excepted to the ruling.

The court then charged the jury as follows:

"1st. In this state all species of gambling, including bets, or wagers on races, are by law held to be immoral and void as against sound public policy.

"2d. The defendant's liability for the money placed in his hands, depends upon whether or not he paid the said money over to Courtier after he had been notified by the plaintiff not to pay it to Courtier.

"3d. If the defendant paid the money to Courtier after notice of the plaintiff not to pay it, he would be liable, otherwise he would not.

"4th. If you find for the plaintiff his measure of damages will be \$200 and 7 per cent interest from the time demand was made for said money.

"In addition to your general verdict you will answer the following question in writing :

"Did the defendant pay the \$200 before plaintiff notified him not to pay it, or afterward?"

The following instruction was given to the jury at the request of the plaintiff:

"2d. You are further instructed that if you find from the evidence that the plaintiff demanded the \$200 de-

posited by him, of the defendant, before the defendant paid it over to J. G. Courtier, or if the jury find from the evidence that said plaintiff had forbidden the defendant paying said \$200 to said J. G. Courtier before he had paid the said money to him, and the defendant, notwithstanding said demand and such prohibition of the plaintiff, subsequent thereto and before the commencement of this action, paid said \$200 to the said Courtier, then you must find for the plaintiff in the sum of \$200 and interest from the 15th day of November, 1883."

Section 214 of the criminal code is as follows: "If any person shall play at any game whatever, for any sum of money or other property of any value, or shall make any bet or wager for any sum of money or other property of value, every such person shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not more than three months; *Provided further*, That if any person shall lose any money or property of any value at any game whatsoever, or on any bet or wager, such person may recover the money or property so lost of either or all of the persons playing at the game at which said money or property was lost, or from the person or persons with whom said bet or wager was had."

It will be observed that this section does not apply to a mere stakeholder who has taken no part in the unlawful transaction at which the money was lost. The plaintiff must recover, if at all, therefore, under the common law. None of the evidence is preserved in the abstract, so that the only question that can be considered is, whether or not, under the issue, the court erred in giving and refusing the instructions above set out.

At common law, where the wager is illegal, either party may claim the money deposited by him from the stakeholder, even after the wager is decided against such party, if the demand is made before the money is actually paid over. If, however, the stakeholder has paid the money



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Meyer v. Wilkie.

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over to the winner before notice or demand upon him by the loser, he is exonerated and no action will lie against him by the loser to recover the same. *Perkins v. Eaton*, 3 N. H., 152. *Howson v. Hancock*, 8 T. R., 575. *McCallum v. Gouley*, 8 Johns., 147. *Livingston v. Wootan*, 1 Nott & Mc., 178. *Hale v. Sherwood*, 40 Conn., 332, S. C., 16 Am. R., 37. *Davenport v. Davies*, 1 M. & W., 570.

As the special findings of the jury show that the money was paid before a demand was made by the loser he is not, therefore, entitled to recover, and there is no error in the instructions given and refused. The judgment is affirmed.

JUDGMENT AFFIRMED.

COBB, J., concurs.

REESE, J., having been of counsel below, took no part in the decision.

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JULIUS MEYER, PLAINTIFF IN ERROR, v. DAVID WILKIE,  
DEFENDANT IN ERROR.

**Trial:** VERDICT SUSTAINED. The verdict of a jury will not be set aside unless it is clearly wrong; and where there is a conflict in the evidence and it is nearly equally balanced the verdict will not be disturbed.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

*Charles Ogden*, for plaintiff in error.

*E. W. Simeral* and *W. A. Redick*, for defendant in error.

MAXWELL, CH. J.

In December, 1882, the plaintiff in error drew a check for \$175 on the Merchants National Bank of Omaha, pay-

able to the defendant or his order, and delivered the same to the defendant. The check was presented for payment, and by direction of the plaintiff refused. An action was thereupon brought against the drawer, to which he answered admitting the drawing of the check, but alleged that prior to the date thereof he and the defendant entered into a verbal contract whereby, in consideration of \$175, the defendant was to construct a skating rink, to be water tight, at the corner of 9th and Farnam street, Omaha; that after said rink was completed it was flooded with water, but the water escaped; that said rink was improperly and unskillfully constructed and would not hold water, and was useless to the plaintiff; that by reason of the unskillful workmanship it was impossible for the plaintiff to use the grounds, which were leased at large expense by reason of being connected with water pipes, hydrant, etc. Wherefore the plaintiff in error claimed damages in the sum of \$200. The reply is a general denial.

On the trial of the cause the jury returned a verdict in favor of the plaintiff below (defendant in error) for \$175.

The principal error relied upon in this court is, that the verdict is against the weight of evidence. The testimony tends to show the rink in question was to be flooded with water, which in the winter time, when frozen, was to be used as a skating rink; that there was a place of considerable depth, called "a swimming hole" in the evidence, near the middle of the floor; that the leak was in this swimming hole. The principal question is, whether it was part of the defendant in error's contract to make this swimming hole water tight. If this was a part of the contract the plaintiff in error is entitled at least to damages for the failure to complete the contract. If it was not a part of the contract then the defendant in error has complied with the terms of the contract and is entitled to the full contract price. Upon these questions there is a direct conflict of evidence, and it is so nearly balanced that it is impossible

Lipscomb v. Lyon.

for this court to interfere. The case was one proper to submit to a jury, and the verdict will not be disturbed unless it was clearly wrong, which it is not. The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

CHARLES H. LIPSCOMB, PLAINTIFF IN ERROR, v. CLARA  
A. LYON, DEFENDANT IN ERROR.

1. **Husband and Wife.** In a case involving transactions between husband and wife in relation to her separate estate, inherited from her father, the same principles of law apply as are applicable to dealings between strangers; but where the effect of such dealings is to deprive creditors of their opportunity to subject the property of the husband to the payment of their claims, the facts involved in such transactions will be viewed with suspicion, and proof of their *bona fides* required.
2. **Instructions considered, and Held,** Properly given and refused.
3. **Witnesses.** A witness who has taken memoranda of facts, at or about the time of their occurrence, and who knows that such memoranda is correct, may hold such memoranda in his hand and testify to the facts, as facts, although he at the time admits that, even with the aid of the memoranda, he does not remember the occurrence of the facts.
4. **Evidence: REPORTER'S NOTES.** The report of the short-hand reporter of a district court of the testimony of a witness examined in such court is not admissible as evidence in a future action between the same parties, as documentary or independent evidence.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

C. B. Letton and W. O. Hambel, for plaintiff in error, cited: *Wake v. Griffin*, 9 Neb., 47. *City Bank v. Hamil-*

19	511
21	41
22	85
19	511
25	193
25	747
26	548
19	511
27	598
19	511
28	874
29	589
19	511
30	550
32	8
32	237
32	644
19	511
33	702
19	511
40	685
19	511
42	184
42	360
19	511
46	394
19	511
47	240

ton, 34 N. J. Eq., 162. *Besson v. Eveland*, 26 Id., 471. *Babcock v. Eckler*, 24 N. Y., 623. *Halsey v. Sinsebaugh*, 15 N. Y., 485. *State v. Hannett*, 54 Vt., 83. *Hendershott v. Henry*, 19 N. W. R., 665.

*B. S. Baker and W. H. Snell*, for defendant in error, cited: *Hill v. Bowman*, 35 Mich., 191. *Miller v. Kirby*, 74 Ill., 242. *Bump. Fraud Con.*, §§ 44, 183. *Montieth v. Baz*, 4 Neb., 170. 1 *Greenleaf Evidence*, §§ 436, 487. Id., §§ 90, 227. *People v. Elyea*, 14 Cal., 145.

COBB, J.

This was an action of replevin brought in the court below by Clara A. Lyon, plaintiff, against Charles H. Lipscomb, defendant, for the possession of a certain stock of saddlery, harness, etc., of the alleged value of \$600, which, as she alleged in her petition, the said defendant had, in his capacity of sheriff of Jefferson county, seized and carried away by virtue of certain writs of attachment against the property of W. A. Lyon. The defendant answered, admitting that he was sheriff of said county; that he had taken said goods by virtue of certain writs of attachment in his hands against the property of W. A. Lyon; "and further alleging that the only right and title of the said Clara A. Lyon claimed by her in or to said property arose by virtue of a pretended contract of sale entered into on or about September 5th, 1883, by W. A. Lyon and said Clara A. Lyon, his wife; that at the time said pretended sale was made, said W. A. Lyon was wholly insolvent, of which fact said Clara A. Lyon had full notice and knowledge; that no consideration was paid by her on said pretended sale of said goods; that said pretended sale was made and entered into by said W. A. Lyon and Clara A. Lyon with the intent and sole purpose of hindering and delaying the creditors of said W. A. Lyon;

and that the same was not a *bona fide* sale of said property; that she well knew at the time said pretended sale was made that the same was for the purpose aforesaid; that no change of possession of said goods ever took place; and that at the time said Lipscomb, as such sheriff, levied upon said goods and chattels, they were the property, and in the possession of said W. A. Lyon," etc. There was a reply in and by which the plaintiff denied all of the material allegations of new matter set up in the said answer.

There was a trial to a jury with a verdict and judgment for the plaintiff. The defendant brings the cause to this court on error, and assigns the following errors:

"1st. The verdict is not sustained by sufficient evidence.

"2d. The verdict is contrary to law.

"3d. The verdict is contrary to the fourth, fifth, and sixth instructions of the court.

"4th. The court erred in refusing to give the second and sixth instructions asked by plaintiff in error.

"5th. The court erred in giving the first, second, and third instructions asked by defendant in error and excepted to by this plaintiff.

"6th. The court erred in excluding a certified copy by court reporter of questions numbered from 1 to 10, inclusive, and answers thereto of the evidence of Clara A. Lyon given on a former trial of this cause in which she testified that at the commencement of this action she was not the owner of the property in controversy.

"7th. That the verdict is contrary to the evidence, and given through prejudice or sympathy.

"8th. The court erred in allowing defendant in error to read in evidence those parts of the deposition of A. I. Lyon objected to by this plaintiff.

"9th. There was error of law occurring at the trial excepted to by plaintiff in error.

"10th. The court erred in excluding evidence offered by plaintiff in error."

These assignments will be examined in convenient groups rather than in detail.

Grouping the 1st, 2d, and 3d assignments together, I here copy the 4th, 5th, and 6th instructions given by the court on its own motion, the same being the basis of the 3d assignment:

"*Fourth.* The statute provides that 'every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.'

"*Fifth.* The court instructs the jury as a matter of law, that any sale or conveyance of personal property to be valid as against the creditors of the seller, must be accompanied and followed by a change in the possession of such property, from the seller to the purchaser, so far as the situation of parties and the character of the property will reasonably admit of a change of possession.

"*Sixth.* Transactions between husband and wife in relation to the transfer or sale of property from one to the other, by reason of which creditors are prevented from collecting their just dues, should be scrutinized very closely, and the *bona fides* of such transactions should be established beyond question."

There was evidence tending to prove that the plaintiff intermarried with Worthy A. Lyon in the state of Illi-

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Lipscomb v. Lyon.

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nois in 1879; that at that time the said Worthy A. Lyon was entirely destitute of capital or means; that in the month of February, 1880, the said Worthy A. Lyon, being engaged working for his father, and being desirous of engaging in business for himself, and his wife having about that time received from her guardians a sum of money, he loaned of her the sum of twenty-four hundred dollars, with the agreement that he was to go out West and look up a place of business, and repay her in property as soon as he could make it out of his business; that this money was advanced to the said Worthy A. Lyon only as a loan, and not as his money or as a gift; that no part of said money had ever been paid to the plaintiff until on or about the 3d day of September, 1883, when the said Worthy A. Lyon conveyed to her the stock of goods in question to apply on said loan of money at the sum of \$800, and the house and lot in which they lived and he did business, at the sum of \$1,000. This was done before the levy of the attachments by the defendant. The evidence of the immediate delivery of the goods by Worthy A. Lyon to the plaintiff, and of the sale being followed by an actual and continued change of possession of the goods is not shown in the abstract sufficiently to dispense with proof of good faith on the part of the plaintiff; but this, I think, she has sufficiently supplied. Whatever may formerly have been the case, under the present state of our statutes and decisions there is no legal reason why a wife may not become the creditor of her husband, nor being such, why she may not be preferred by him over other creditors. It is true that courts will look with scrutiny, if not with suspicion, upon all sales or transfers of property of a debtor in failing circumstances to members of his own family; but, if upon such examination they are found to be honest and based upon sufficient consideration, they will be upheld. I therefore think that the verdict is sustained by sufficient evidence, and that it follows the instructions above quoted.

The following are the second and sixth instructions prayed by plaintiff in error, the alleged refusal to give which constitutes the fourth assignment of error:

"*Second.* The jury are instructed that every sale of property made by the parties with the intent to hinder, delay, or defraud creditors in the collection of debts is fraudulent and void as to such creditors, even though made for a valuable consideration.

"*Sixth.* If you find from the evidence that Clara A. Lyon permitted her husband to use her money in his business for a long period of time, without any evidence of indebtedness having passed between the parties, she is not such a creditor of his that she may be preferred to other creditors in the distribution or appropriation of his property, and any such appropriation, whether by sale or otherwise, whereby other creditors are hindered, delayed, or defrauded in the collection of their just claims, is fraudulent and void as against such creditors." Sixth refused. Plaintiff excepts.

According to the abstract the first of the above instructions, to-wit, the one marked *Second*, was given; it will, therefore, not be further considered. The sixth instruction, which was refused, and such refusal duly excepted to by plaintiff in error, was, as I think, properly refused. It seeks to recognize a difference, both in law and in fact, between *bona fide* debts owing by a husband to his wife and those owing to other creditors. We have seen that there is no difference in law, yet that, owing to the facilities as well as the temptations afforded and stimulated by the family relation for fraudulent concealments and transfers of property in cases of business disaster, the law has laid the duty just duties and juries to examine with jealous eye *bona fides* of into the facts of a case where it is need beyond question family relation has been used as the cover. There was evidence for fraudulent transfers of property, either married means of pretended debts from one member of



the family to another, or otherwise; but when the facts have been scrutinized and found, the same principles of law apply to dealings between husband and wife as to those between strangers.

The following are the first, second, and third instructions given by the court at the request of the plaintiff in the court below, upon which the fifth assignment of error is based:

"*First.* A husband indebted to his wife may prefer her to his other creditors, and make a valid appropriation of his property to pay her claim, even though he is thereby deprived of the means to pay other debts.

"*Second.* If you find W. A. Lyon was indebted to plaintiff, she had a right to take as payment on her claim against W. A. Lyon the goods in question, if done in good faith, though others are thereby deprived of all means of obtaining satisfaction for their equally meritorious claims.

"*Third.* You are further instructed that if you find that W. A. Lyon sold the goods replevied to plaintiff, although the sale may have had the effect to hinder and delay his creditors in the collection of their debts, this fact alone will not render the sale fraudulent or void; a debtor, however insolvent, may lawfully sell his property, if it is done with a *bona fide* intention of applying the proceeds in the discharge of any legal liability."

These instructions announce the same general principles that we have been discussing, and what we have said need not be repeated.

As applicable as well to the fifth as to the fourth assignment of error, I have carefully read the Nebraska cases cited by counsel for plaintiff in error, and find that neither of them sustain the proposition to which they are now applied, as applicable to the case at bar. In the case of *Aulis stock Ohermeyer*, 6 Neb., 260, the most that was claimed the answered, the wife, beside that she had received a deed from her husband, was that it had been purchased from our own

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money, a part of which was received for lands in Wisconsin belonging to her, and a part for lands also in Wisconsin belonging to himself, and which money he had used and deposited as his own, without any promise on his part to account to her for that part which was derived from her property, and there was no evidence to show, so far as can be gathered from the report, what part or proportion of the money paid for the land was derived from the sale of the wife's property. The court, in the opinion, say: "But, in our opinion, the proof fails to establish the fact that the money with which this land was purchased was derived from the sale of lands belonging to the wife." In the case of *Wake v. Griffin*, 9 Neb., 47, the court decided—I quote from the syllabus: "In an alleged sale of goods by the husband to his wife, the only consideration was a *pretended loan of money* by the wife to him some five or six years before, which he had ever since used in his business and treated as his own. *There was no evidence of any agreement or understanding at the time he took the money, nor any recognition by him at any time that he was to repay it; Held*, That the wife had no legal claim against her husband for the money, nor would she be permitted, through a voluntary sale, nominally in repayment of that money, to appropriate his property to the exclusion of the claims of *bona fide* creditors." I have italicized parts of the above quotation as a method of pointing out the essential difference between that case and the one at bar. The other two cases cited are cases where the wife claimed certain lands as having been purchased with her money, although the titles were taken in the name of the husband, and the turning point in each of said cases was that the wife had suffered the title to the lands to remain in the husband for a length of time, and under a state of circumstances that established beyond question his title. In my opinion, the law of Nebraska as cited is against the defendant in error in a married couple.

The sixth error assigned is, that "the court erred in excluding a certified copy by court reporter of questions from one to ten inclusive, and answers thereto, of the evidence of Clara A. Lyon, given on a former trial of this cause, in which she testified that at the commencement of this action she was not the owner of the property in controversy." I do not think that this point is presented in the record in a manner to be available to the plaintiff in error. The following is so much of the abstract as purports to present this point:

"S. A. Searle (page 58) testified as follows: 'I am the court reporter of the 5th Judicial District of Nebraska; I was present on the former trial of this case, at the last term of this court; I heard the evidence on that trial, and made a short-hand report of the same as such court reporter; my record of the evidence included the evidence of Clara A. Lyon.'

"The witness was then asked the following questions, with the objections thereto and the rulings thereon, to-wit:

"Q. Mr. Searle, you may state whether the questions and answers as reported in that document (indicating a certified transcript of Clara A. Lyon's evidence) was a part of the testimony on that trial?

"The defendant in error objected to the question for the reason that they were not the questions and answers that were asked for impeachment purposes, which objection was sustained by the court, and plaintiff in error excepted to the ruling of the court.

"Q. You may state whether Mrs. Clara A. Lyon, the plaintiff, on the trial of this action at the last term of this court, in answer to the question asked her by Mr. Baker, whether at the time this suit in replevin was commenced she was the owner of this property, this stock of goods, at the time she commenced the replevin, she answered, 'No, sir.'

"Direction by the court: 'Speak from your own memory.'

"A. (Page 59.) I cannot give a *verbatim* report from my memory independent from the notes, and there is not a reporter in the world that can. I can testify that I know that report and the record of what she testified to be correct, and that she made the statements therein contained (including a record of the testimony).

"Plaintiff in error presents the reporter's certified statement and record (referred to and identified by the witness Searle) of the evidence of Clara A. Lyon, given on the former trial of this case at the last term of this court, which said statement and record had the following heading, to-wit: (Page —)

"In district court of fifth judicial district, held within and for the county of Jefferson and state of Nebraska.

"Abstract of evidence of Clara A. Lyon offered and received in evidence on the trial at September term of said court for the year 1884, to-wit: September 24th, 1884, in the case of Clara A. Lyon vs. C. H. Lipscomb.

"Among other questions and answers contained in said abstract of testimony was the following question, propounded by Mr. Baker, with the answer thereto, to-wit:

"Q. 1. At the time this suit in replevin was commenced were you the owner of this property, of this stock of goods, at the time you commenced the replevin?

"A. No, sir.

"Plaintiff in error offered in evidence that part of said certified record of said testimony containing said question and the answer thereto, to the introduction of which the defendant in error objected for the reason that it is incompetent, which objection was sustained by the court, and the plaintiff's in error exception noted to the ruling of the court.

"Plaintiff in error then offered in evidence the questions numbered from 2 to 10, inclusive, and the answers thereto, to the introduction of which the defendant in error objected for the reason that the same were incompetent,

which objection was sustained by the court, and plaintiff's in error exception noted to the ruling.

"Said abstract and record of evidence had attached thereto the certificate of the reporter as follows, to-wit:

"State of Nebraska, Fifth Judicial District, ss. I here certify that the above and foregoing is a true and correct statement, record, and transcript of the testimony of Clara A. Lyon, and that it contains all the testimony of said witness given by her to the court and jury on the trial of said cause, wherein said Clara A. Lyon was plaintiff and C. H. Lipscomb was defendant, trial whereof was had at the September term of said district court, held within and for the county of Jefferson, state of Nebraska, for the year A.D. 1884, to-wit: On the 24th day of September, 1884.

"In witness whereof I have hereunto set my hand in said district, this 14th day of April, 1885.

"(Signed)

S. A. SEARLE,

*" Ct. Rept'r, 5th Dist."*

It is not stated in the abstract with sufficient clearness whether the plaintiff in error offered the witness Searle to testify to facts by the aid of his notes, taken by him as reporter of the court, as memoranda to refresh his memory or merely to authenticate the notes certified by him, and then offered the notes as documentary evidence. If the former, the evidence ought to have been received, although the witness admitted that even with the aid of the memoranda he did not remember the facts, yet that he knew that he took the testimony down correctly at the time. If the latter, it was correctly excluded. Memoranda taken down by a witness at or about the time of the occurrence of the events to which they refer may be used as an aid to the memory of the witness, but not as a substitute for such memory. Such is the substance of the rule as laid down in the New York cases cited by counsel for plaintiff in error. My understanding of this rule is,

that a witness who has taken memoranda of an occurrence at or about the time of its taking place, for instance, taken down the testimony of a witness in a lawsuit, and who knows that such memoranda is correct, may hold such memoranda in his hand and testify to the facts as facts, although at the same time he admits that even with the aid of the memoranda he does not remember the occurrence of the facts. But that with no amount of testifying or certifying to the correctness of the notes or memoranda can the paper be introduced to show and stand for itself as independent or documentary evidence.

Under repeated decisions of this court, in order for the plaintiff in error to avail himself of the error of the court in rejecting the evidence of the witness S. A. Searle he must have made an offer of the testimony, clearly indicating what he expected to prove by the witness in response to the question or questions propounded to him and ruled out by the court. In this connection it will be observed that the plaintiff in error does not assign as error the rejection of the testimony of the witness Searle.

It may be admitted to be the law—it undoubtedly is in New York—that where a witness has been examined at a hearing before a coroner or committing magistrate his testimony taken down in writing, read by or to him, and subscribed by him as correct, and the witness is again sworn upon the trial of the cause in the trial court, his testimony on the examination may be read to contradict his testimony on the trial, and that without laying a foundation for impeachment. There is a wide difference, however, between the case above supposed, and where the reporter's notes of the testimony has never been even translated from the reporter's private cipher, much less read to, approved, and signed by the witness.

The 8th assignment of error, and the last which I deem it necessary to mention, is, that "the court erred in allowing defendant in error to read in evidence those

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Bowman v. State.

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parts of the deposition of A. I. Lyons objected to by this plaintiff."

I have examined the abstract in vain for the ground of this assignment. The testimony of A. I. Lyons is there quoted quite briefly, but not a word about an objection to the reading of any part of his deposition or of any ruling thereon.

I do not find any reversible error in the abstract of the record presented, and so the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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CHARLES E. BOWMAN, PLAINTIFF IN ERROR, V. THE  
STATE OF NEBRASKA, DEFENDANT IN ERROR.

**Criminal Law: NEW TRIAL: REMARKS BY COURT.** The defendant was arraigned upon an indictment for a statutory felony, whereupon his counsel presented a motion for a continuance of said cause; and in support thereof presented and read the affidavit of the prisoner, in which he swore that he could not safely proceed to trial at the then present term of the court for the want of certain material witnesses, among the rest, Calvin Bowman, the father of the prisoner. Whereupon the court, or judge thereof upon the bench, in the presence of certain of the regular panel of petit jurymen, some of whom afterwards sat in the trial of the cause, said, stated, and declared that said affidavit was false; that defendant's father had told him that he would have nothing to do with the defendant; that defendant had committed perjury, and that a grand jury would be called to investigate the same. *Held*, Error and a new trial awarded.

ERROR to the district court of Harlan county. Tried below before GASLIN, J.

*John Dawson*, for plaintiff in error.

*William Leese, Attorney General, and W. S. Morlan*, for the state.

COBB, J.

The plaintiff in error was indicted at the May, 1885, term of the district court of Red Willow county, for the crime of dealing, playing, and practicing a certain game with cards, said game being then and there dealt, played, and practiced the same and in such manner as the confidence game and swindle known as three card monte, etc. Upon his plea of not guilty to said indictment, he was, at the adjourned term of said court in the month of June following, tried to a jury, which found him guilty; and upon the overruling by the court of his motion for a new trial he was sentenced to a term of three years in the penitentiary. He brings the cause to this court on error.

There are nine errors assigned, but it is deemed unnecessary to set them out at length here, as we think the case turns on the first and ninth assignments, which are as follows:

"1. The court erred in overruling the plaintiff's challenge to the jurors Thomas Clark and Thomas Cott."

"9. The court erred in stating that this plaintiff (in error) had perjured himself in the presence and hearing of some of the jurors in said cause."

It appears from the affidavits of the defendant, plaintiff in error, and one of his counsel, that at the term of the court at which the indictment was found, and at which the regular panel of petit jurors who tried the cause were in attendance, and on or about the 15th day of May, 1885, it being one of the days of the regular May term of said court, a jury was called and placed in the jury box for the purpose of hearing the said cause, and giving a verdict in



the same; and among said jurors were Thomas Clark and Thomas Cott, who sat as jurymen upon the trial of said cause when it was tried on the 22d day of June of said year; that upon the occasion first aforesaid, and in the presence and hearing of the said first mentioned jurymen, especially the said Thomas Clark and Thomas Cott, the defendant, plaintiff in error, caused to be read a motion which was presented and filed in his behalf for a continuance, supported by an affidavit for want of material witnesses; that among the witnesses whom said defendant stated in his said affidavit to be material to his defense, and whose attendance could not be procured at the said term of court, was Calvin Bowman, the father of the defendant; that upon the reading of the said affidavit, the court, or perhaps more correctly speaking the presiding judge of said court, then sitting upon the bench, in open court, in an excited manner, said that said affidavit was false; that defendant's father had told him that he would have nothing to do with him, the defendant; that defendant had committed perjury and that a grand jury would be called to investigate the same on the 22d day of the following month; that these remarks of the court were made in the presence and hearing of the said jurors, Thomas Clark and Thomas Cott, who afterwards, against objection and challenge for cause of the said defendant, were permitted to sit as jurors upon the trial of said cause.

It also appears from the bill of exceptions that upon selecting the jury for the trial of this case both of the said jurymen, Thomas Clark and Thomas Cott, were sworn and examined on their *voir dire*. They each testified that they were present, heard, and still remembered the remarks of the court or presiding judge hereinbefore set out; but each denied any knowledge of the guilt or innocence of the accused, having formed or expressed any opinion of his guilt or innocence, or having any bias or prejudice for or against him. They were both challenged

for cause by counsel for the defendant, which challenge was in both cases overruled by the court. The said jurymen were both sworn and sat in the case. It also appears that in selecting the said jury the said defendant used and exhausted all the peremptory challenges allowed him by statute.

There was no error on the part of the court in overruling the challenge in the case of either of the said jurors. Tested by the rule laid down in section 468 of the criminal-code, there was no ground for challenge for cause in the case of either of them. It by no means follows that it was proper or justifiable on the part of the court to make the remarks of and concerning the prisoner about to be placed upon trial, in the presence and hearing of jurymen, either already drawn or liable to be drawn as jurymen in the case, as set out in the bill of exceptions as aforesaid. Indeed, it adds to the danger and impropriety of the use of such expressions by the court, that the mischief liable to flow from them is an insidious one, the remedy for which is not provided by statute or the rules of practice. Both of these jurymen testified on the *voir dire* that they had not either formed or expressed an opinion as to the guilt or innocence of the accused of the crime of which he stood charged; but they did not state, nor could they be properly asked on the *voir dire*, that they did not agree with the court that he was a perjurer, or that his father had presumably become so disgusted with his conduct that he abandoned him to his fate and would have nothing more to do with him. The sole object for which men are selected and called to serve on juries is that the truth may be ascertained and declared upon the points in dispute between the parties. This truth must be ascertained, not from the previous knowledge or wisdom of the jurymen, but from the testimony of sworn witnesses, and the examination of documents duly authenticated and produced under forms of procedure and the control of the

court. For this purpose it is of the first importance that each juryman should enter the box as near as possible free of previously acquired knowledge, or of that which he believes to be, but which may or may not be, knowledge of the facts of the case. Also, as free as possible of either knowledge or opinions of collateral facts calculated to either stimulate or retard the mind in the reception of either evidence or argument favorable to one party or the other to the controversy.

It is true, and it is a truth greatly to the credit of the people, that there is no officer or person, however high in the state or nation, who possesses the respect of or influence over all classes of the people equal to the district judge. When upon the bench he represents the majesty and the power of the law and of the state directly to the people. This condition, doubtless, depends in a great degree upon that principle in our judicial system which, in the great majority of cases, makes the jury the sole judges and arbiters of matters of disputed fact between the parties, leaving to the judge or court the serene field of the application of these facts, when found, to the principles of law by which they should be governed. Yet, while such is the case, it is a truth which has been often remarked with admiration and wonder, that the people, and especially jurors, almost always possess the most implicit confidence in the power and prescience of the trial judge to properly weigh and apply the evidence and understand the facts in the case.

Such being the high regard of the people, and especially of the juryman, for the trial judge, can it be conceived that, upon the arraignment of a prisoner for a felony, and his presenting his affidavit for a continuance, the court may solemnly declare that the prisoner has added corrupt perjury to the crime for which he is already indicted, and threaten to have a grand jury in attendance for the purpose of indicting him for such perjury, without such declaration of

the court prejudicing the defendant in the minds of the jurors present and hearing such declarations? I think not. It may be granted that such declaration or expression of the court did not cause the future juror to form or express an opinion as to the guilt or innocence of the accused, but it did prevent him from entering the jury box with his mind a *tabula rasa* so far as the guilt or innocence of the prisoner was concerned, whether he was himself aware of what had been written thereon or not.

I come to the conclusion, therefore, that it was error on the part of the court to make in the presence of jurors of the regular panel the declarations and statements in regard to the defendant which he is shown to have made. The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

19	528
28	254

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WILLIAM S. CROW, PLAINTIFF IN ERROR, V. ADNA H. BOWEN, DEFENDANT IN ERROR.

County Courts: JURISDICTION. County courts have no jurisdiction to hear and determine actions brought against officers for the penalty imposed by section 34, chapter 28, Compiled Statutes of 1885, for taking illegal fees.

ERROR to the district court for Adams county. Tried below before MORRIS, J.

*John M. Ragan*, for plaintiff in error.

*Adna H. Bowen*, pro se.

REESE, J.

The only question presented for decision in this case is, whether or not the county court has jurisdiction in an action against an officer for the penalty provided by section 34 of chapter 28 of the Compiled Statutes of 1885. This section is as follows:

"If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited, where the business for such fees are chargeable shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts of the same amount are recoverable by law."

It is provided by section 2 of chapter 20, Id., that county judges shall not have jurisdiction "in any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace." The exception referred to is contained in the ninth subdivision of section 905 of the civil code, which gives to justices of the peace jurisdiction "to proceed against constables failing to make return, making false return, or failing to pay over money collected on execution issued by such justice." It therefore appears that by these sections neither the county court nor justices of the peace (under the provisions of section 907 of the civil code) have any jurisdiction in actions against officers for misconduct in office, and if the facts alleged constitute misconduct in office then this action cannot be maintained, unless the jurisdiction is given by the last clause of section 34 above quoted, which is, "to be recovered as debts of the same amount are recoverable by law."

To our mind this does not give the jurisdiction. It

simply provides the *manner* in which such actions may be prosecuted. The jurisdiction or power to hear such cases is withheld by the law giving county courts jurisdiction in civil cases, and there is nothing in section 34 which confers it. That the collection of exorbitant and illegal fees by an officer by virtue of his office is "misconduct in office," is self-evident, and, as we understand it, is conceded by defendant in error; his only contention being, that the clause quoted from section 34 confers the jurisdiction.

As this action was instituted in the county court, it follows that it was without jurisdiction, and that the decision of the county judge dismissing the case was correct. The judgment of the district court reversing the decision of the county court is reversed and the cause is dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

19	530
24	556
19	530
50	799
19	530
159	655

WILLIAM L. CLAY, PLAINTIFF IN ERROR, V. JAMES H. TYSON, DEFENDANT IN ERROR.

1. **Statute of Frauds: PROMISE TO PAY DEBT OF ANOTHER: CONSIDERATION.** A petition which alleges that A was indebted to the plaintiff, and that B received from A a large amount of personal property, and in consideration thereof agreed to pay the debt to plaintiff, and that B promised the plaintiff, who was about commencing suit, that he would pay the debt, and that if plaintiff would forbear suing until he could sell the property he would pay him, and that in consideration of such promise plaintiff did forbear until after the property was sold, but that B then refused payment, states a cause of action, and one which is not within the statute of frauds.
2. **Evidence: ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS.** Where an attorney is employed for a particular purpose, and before such employment he informs his client that

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Clay v. Tyson.

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he has been employed against him in a case not connected with the employment, and with full knowledge of such fact the employment is made for the purpose required, the relation of attorney and client does not exist so far as the purpose of the first employment is concerned, and statements made to the attorney with reference to any fact in dispute in the controversy in which the first employment is made is not a privileged communication.

3. **ERROR: REVERSAL OF JUDGMENT.** A judgment will not be reversed for errors committed on the trial of a cause which are not prejudicial to the party complaining.

**ERROR** to the district court for York county. Tried below before **NORVAL, J.**

*Sedgwick & Power*, for plaintiff in error.

*France & Harlan*, for defendant in error.

**REESE, J.**

By the petition filed in the district court by defendant in error, it was alleged substantially, that plaintiff in error (defendant below) was the father of one Seth H. Clay, who, before the time of making the alleged promises, was a citizen of York county. That the said Seth was indebted to defendant in error (plaintiff below) in the sum of \$200, evidenced by two promissory notes of Seth of \$100 each, both of which were due. That Seth was the owner of a large amount of personal property in York county. That said property was transferred to plaintiff in error by said Seth, in consideration of which the plaintiff in error agreed with the said Seth to pay to defendant in error the amount due from Seth, and that afterwards, and while in possession of said personal property, the plaintiff, in consideration of the promises, and the further consideration that defendant in error, at the request of plaintiff in error, would forbear to bring suit on his said claim until plaintiff in error could sell the property received from his son, he promised and

agreed with defendant in error that he would pay the indebtedness. It is further alleged that the property of the son had been sold, but that plaintiff in error refused to make the payment as promised. The answer admits the indebtedness of the son and the relationship alleged to exist between them, but denies all the other allegations of the petition. Judgment was rendered in favor of defendant in error for the amount claimed. Plaintiff in error brings the cause into this court by proceedings in error. The first contention is, that the petition does not state facts sufficient to constitute a cause of action. It will be seen that two agreements are alleged in the petition, one that of plaintiff in error with his son, that, in consideration of the transfer of the property to him, he would pay the debt due defendant in error, followed by the promise to defendant in error that, in consideration of his forbearance to sue the son, he would pay the debt. It is insisted these contracts are within the statute of frauds. We think not. The agreement alleged to have been made with the son was a new and independent contract, based upon a valuable consideration, by which plaintiff in error created a new debt, which he agreed to pay—not to the son, his original creditor—but to defendant in error. When the promise was made to defendant in error, and accepted by him, it then became a debt due from plaintiff in error to defendant in error, and was not within the statute of frauds. *Morrison v. Hogue*, 49 Iowa, 574. *Elwood v. Monk*, 5 Wend., 235. *Lawrence v. Fox*, 20 N. Y., 268. *Clopper v. Poland*, 12 Neb., 69. *Farley v. Cleveland*, 4 Cowen, 432. *Fitzgerald v. Morrissey*, 14 Neb., 198. *Romberg v. Hughes*, 18 Neb., 579.

It is insisted that the court erred in overruling the objections of plaintiff in error to the testimony of George B. France, a witness for defendant in error. This objection was based upon the assumption that Mr. France was the attorney for plaintiff in error at the time the statements



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Clay v. Tyson.

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were said to have been made. As to whether or not the relation of attorney and client existed between Mr. France and plaintiff in error to such an extent as to protect plaintiff in error from the repetition of his statements was, under the circumstances, a question of fact, upon which the trial court had to pass. It was conceded that the firm of France & Harlan had been employed to transact for plaintiff in error certain business growing out of the dealings of Seth Clay in York county, but Mr. France testified that at the time of the employment by plaintiff in error he informed him that they had been retained by certain creditors, naming them, and among whom were defendant in error, and that plaintiff in error expressed himself satisfied, saying there would be no trouble about that, etc. If that was true, and of that the court was the judge, there was no impropriety in allowing the witness to testify. From the testimony of the witness it further appears that the employment of the firm by plaintiff in error was not for the purpose of litigation, either for the prosecution or defense of cases, but for the purpose of closing up the business and accounts of Seth Clay. After hearing the testimony upon the question presented, the court decided that the relation of attorney and client did not exist with reference to the matters involved in this case, and we cannot say there was error in the decision. We do not wish to be understood as approving the practice of attorneys taking the witness stand and testifying in causes on trial, for we think it is one not to be favored to any extent, yet a case occasionally arises where it is too late for an attorney to withdraw from a case without manifest injury to his client, and where his testimony is absolutely essential to the due administration of justice. In such cases the only proper course seems to be for the attorney to take the witness stand.

A letter from plaintiff in error to Mr. France was received in evidence over the objections of plaintiff in error. This ruling of the court is assigned for error. For the

purpose of this inquiry it may be conceded that at the time of writing the letter plaintiff in error understood that Mr. France was his attorney, and that the letter was written in confidence; yet we cannot hold that its admission was reversible error. It consists principally in a denial of the contract upon which the suit was based, and, in substance, a claim that he only promised defendant in error to pay the value of the property for which the notes were given, which he said would be from \$125 to \$150, and that only after he had sold his land in Nebraska, which he had not yet done, and therefore he owed plaintiff in error nothing. If there was error in its admission it was clearly without prejudice.

The testimony in the case was in some important respects quite unsatisfactory, yet we cannot say there was such a want of evidence as to require a reversal of the case. It was tried to the court without a jury. The findings of fact are entitled to the same weight as if found by a jury.

The judgment is therefore affirmed.

**JUDGMENT AFFIRMED.**

**THE other judges concur.**

10 534  
26 642

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**JOEL E. MORRILL, PLAINTIFF IN ERROR, V. JAMES M. TEGARDEN, DEFENDANT IN ERROR.**

1. **Malpractice:** PETITION. Action for damages for alleged malpractice; petition examined and held to state a cause of action.
2. **Evidence:** HYPOTHETICAL QUESTIONS: EXPERTS. If hypothetical questions are resorted to in the examination of expert witnesses, they must be so framed as to fairly reflect facts, either admitted or proved by other witnesses. *O'Hara v. Wells*, 14 Neb., 403. When this is done it will be sufficient.

3. **Trial: VERDICT SUSTAINED.** The jurors are the triers of fact in a cause tried to them, and their decision upon conflicting testimony cannot be set aside unless clearly wrong. Under this rule it is held that the evidence is sufficient to sustain the verdict.

ERROR to the district court of Merrick county. Tried below before POST, J.

*A. Ewing* and *J. W. Sparks*, for plaintiff in error.

*A. L. Reinoehl* and *John Patterson*, for defendant in error.

REESE, J.

At the commencement of the trial of this cause in the district court plaintiff in error objected to the introduction of any testimony, for the reason that the petition was insufficient and did not state a cause of action. The objection was overruled, to which plaintiff in error excepted, and now assigns said ruling as error.

The action was for damages resulting from alleged malpractice in reducing and treating a fractured limb. The petition alleges the fracture, employment of plaintiff in error (defendant below), the undertaking on his part, the carelessness, negligence, and unskillfulness complained of in reducing, binding up, dressing, and caring for the injury, by reason of which it was alleged defendant in error has nearly lost the use of said limb and is rendered unfit and unable to follow his lawful business, besides the extra expense incurred as special damages, etc., the whole damages being laid at \$3,000. This petition substantially follows the forms and precedents given by Nash—see Pleading and Practice, 527—and is in harmony with other forms given by writers upon pleading and practice under the code, and no doubt states a cause of action. See also Bates' Pleading and Parties, 656; Estes' Pleadings, § 1876; Maxwell's Pleading, 4th ed., 303.

The objection to the evidence is in the nature of a demurrer to the petition, *Curtiss v. Cutler*, 7 Neb., 318, and of course admits all allegations of fact which are well pleaded. Therefore, if a demurrer to the petition could not have been sustained it is clear there was no error in the ruling of the trial court. Many objections to the petition are contained in the brief of plaintiff in error, and it abounds with suggestions of imperfections, such as that the petition does not show that the leg was stiff, sore, crooked, or what was the matter with it, and that it is not alleged in what way plaintiff in error was negligent or unskillful, whether the limb was bound too tightly or too loosely, or that it was dressed too often or not often enough, etc. All the foregoing is included in the allegation that the plaintiff in error so negligently and unskillfully reduced, bound up, attended, etc., the said fracture that the said plaintiff—defendant in error—by reason of such unskillfulness and negligence had nearly lost the use of his leg, and has been rendered unable to follow his business, etc. Had the allegations suggested by plaintiff in error been necessary a motion for a more specific statement of the cause of action under section 125 of the civil code might have been sustained, but as plaintiff in error answered to the merits without requiring such amendment his objection for that reason must be taken as waived.

The next point presented for decision is, that the court erred in allowing defendant in error to propound a hypothetical question to his witnesses which, it is claimed, did not reflect all the facts established by the witnesses, under the rule laid down in *O'Hara v. Wells*, 14 Neb., 403. The question is a very long one, and, so far as we are able to discover by a careful reading of the testimony given in support of the theory of defendant in error, covers all the essential parts of the case. The plaintiff in error fails to point out any material discrepancy, and we are unable to find any.

The third and last contention of plaintiff in error is, that the verdict "is not supported by the testimony and is contrary to law." For the purpose of deciding this question it has been necessary for us to carefully examine all the testimony introduced in the case, and we have done so. Each of the seven reasons assigned by plaintiff in error in support of this contention, if viewed from the standpoint of the truthfulness of the testimony of plaintiff in error and his witnesses, is unquestionably good and the verdict would have to be set aside. And it is fair to say that in some respects the stronger reason seems to sustain the view contended for by them. But if we adopt the theory of fact presented by defendant in error and his witnesses, as the jury must have done, then the view of the plaintiff in error cannot be adopted and the verdict of the jury must be allowed to stand. The jurors are the triers of fact and their verdict cannot be molested unless clearly wrong.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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SAMUEL R. JACOBY, PLAINTIFF IN ERROR, V. ROBERT MITCHELL AND HENRY BROADWATER, DEFENDANTS IN ERROR.

1. **Bill of Exceptions.** Affidavits used as evidence upon the hearing of a motion in the district court will not be considered in the supreme court unless preserved as a part of the record by a bill of exceptions, and when such papers are improperly attached to the record they will, upon motion, be stricken from the files. *Graves v. Scoville*, 17 Neb., 593.
2. **Appeal: NONSUIT.** Where an appeal is taken to the district court from the judgment of a justice of the peace, and the

plaintiff fails to prosecute his appeal by filing his petition within the time required by law, and no excuse is shown which would justify the delay, it is not error for the district court, on motion and notice to the plaintiff, to nonsuit the plaintiff and render judgment as provided in sections 1010-11 of the civil code.

3. **Motion: PRACTICE.** When a motion is argued and submitted to a court for a decision thereon, it is the duty of the court to decide the same upon the record as it existed at that time, unless the submission is set aside or it is brought to the knowledge of the court that a party desires to be heard upon a different condition of the record. Any papers filed after the submission without leave of the court or the knowledge of the judge will not be considered in reviewing such decision.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

*L. C. Burr*, for plaintiff in error.

*Foxworthy & Son*, for defendants in error.

REESE, J.

Defendants in error file motion to strike certain affidavits from the paper in this cause, for the reason that they are not made a part of the bill of exceptions and preserved in the record thereby. As it is well settled in this court that affidavits purporting to have been used as evidence on the hearing in the district court, to be available here, must be preserved by a bill of exceptions making them a part of the record, and this has not been done, the motion is sustained. *Graves v. Scoville*, 17 Neb., 593.

The original action was instituted before a justice of the peace by plaintiff in error. The trial resulted in favor of defendant. Plaintiff in error appealed to the district court, filing his transcript on the 29th day of October, 1883, during the term of said court, and the cause was placed upon the docket by the clerk.

On the 25th day of February, 1884, and during the February term of said court, the defendant filed a motion for non-suit and judgment under the provisions of sections 1010-11 of the civil code. The motion was sustained and judgment was rendered accordingly. Plaintiff alleges error in this ruling of the court. As the time for filing the petition had expired, and no excuse for the neglect was shown, the decision of the court was correct. Had any good reason for the delay existed, it was the duty of plaintiff to have presented the same to the court and then any abuse of discretion, if any existed, could have been corrected, but as no such showing was made there could be no discretion in the matter.

The motion was argued and submitted to the court on the 7th day of March, 1884. After the submission, but before the final ruling was made, plaintiff filed his petition and an affidavit of one of his counsel, but they were filed without leave of court and without the knowledge of the presiding judge, and were not considered by him when passing on the motion. This could not aid plaintiff in any respect. The district court could not do otherwise than decide the case as presented to him, and when so presented and submitted he had the right, and it was his duty, to decide upon the merits as presented by the record at that time, notwithstanding the fact that the decision may have been made some days afterwards, unless some action was taken by plaintiff to set aside the submission or in some way bring to the knowledge of the court his desire to be heard upon a different condition of the record from that upon which the submission was made. It would be an anomaly to hold that after a cause was submitted to a court for its decision that the judge should examine the files and records of the case immediately before his decision, for the purpose of ascertaining whether or not the parties had filed, without his knowledge or consent, anything which would change the legal aspect of the case. Common fairness to

the court, if no other reason, would condemn such a proposition.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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DEWEY & STONE, PLAINTIFFS IN ERROR, v. C. N. PAYNE  
& Co., DEFENDANTS IN ERROR.

**Landlord and Tenant.** A leased certain real estate to B for the term of two years, B agreeing to pay therefor the sum of nine hundred and sixty dollars in installments of forty dollars on the first day of each month during the term, which extended from January 1st, 1880, to January 1st, 1882. The lease was in writing. On the 12th of October, 1880, the lessee, for value, and with the consent of the lessor, transferred his lease by parol to C who took possession thereunder and held until the 9th of March, 1881, paying rent to A according to the terms of the lease, when he vacated and refused to pay rent for the remainder of the year and term; *Held*, C was liable for the rent whether he occupied the premises or not.

ERROR to the district court of Adams county. Tried below before MORRIS, J.

*Dilworth, Smith & Dilworth*, for plaintiffs in error.

*Batty & Ragan*, for defendants in error.

REESE, J.

Defendants in error executed to Maxon Brothers a written lease to certain property for the term of two years, beginning January 1st, 1880, and terminating January 1st, 1882, for the sum of nine hundred and sixty dollars, to



be paid in installments of forty dollars each on the first day of each month during the term. The lessees took possession and held until October 12th, 1880. No objection is made to this lease, nor is its efficacy questioned. Maxon was engaged in business as a furniture dealer. On the last named date they sold their stock of goods to plaintiffs in error, who took possession of the leased property (a store building) and occupied it until the 9th day of March, 1881, when they vacated it and refused to pay rent after that date. This action was brought to collect the rent from that time until the termination of the lease, defendants in error alleging in their petition that Maxon Bros. assigned the lease to plaintiff in error as a part of the consideration for the goods, who went into possession of the premises under and by virtue of the assignment, and continued their occupancy thereunder until the said 9th day of March, and that they afterwards refused to carry out their contract in that behalf. The answer is a general denial.

It is insisted by plaintiffs in error that they did not agree to accept an assignment, and carry out the terms of the lease, and that the verdict upon that question is not supported by the evidence. Upon this part of the case it is sufficient to say that the testimony is quite contradictory, but this question of fact was necessarily determined against plaintiffs in error by the jury, and there is sufficient to sustain the verdict as to the existence of the agreement.

No written assignment of the lease was made, and the real and controlling question in this case is, whether or not the parol contract or agreement between Maxons and plaintiffs in error and agreed to by defendants in error, followed by possession thereunder, is sufficient to take the case out of the statute of frauds, as declared by section 5, chapter 32, Compiled Statutes 1885, which is as follows:

"Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in

lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made."

For the purposes of this inquiry we must assume that the verdict of the jury is correct, and that the agreement between the parties was made as testified to by the witnesses of defendants in error, and that plaintiffs in error took possession of the property, occupied it, and paid rent therefor under and by virtue of the contract. This being true we think their liability follows, and the judgment is correct. It has been substantially the uniform holding of courts that a part performance of a contract of purchase, such as taking and holding possession thereunder, will take a case out of the statute, and that the vendor cannot be heard to set up the statute in bar of the recovery of the vendee in possession. Wood on Frauds, §§ 448, 490, and cases there cited. Reed on the Statute of Frauds, § 578, and cases cited in note (x). We are unable to see any distinction in the application of the rule, and, in fact, it has been applied to cases of the kind before us. In the Earl of Aylesford's case, cited in Roberts on Frauds, there was a parol agreement for a lease of twenty-one years, upon which the lessee entered and enjoyed for six years. A bill was brought to oblige the lessee to execute his counterpart of the contract for the residue of the term. The lessee pleaded the statute of frauds. The plea was overruled because the agreement had been part performed. See also *Grant v. Ramsey*, 7 O. S., 157. Reed on Statute of Frauds, § 582, and cases cited in notes (e) and (f). Bigelow on Fraud, § 2, chap. 10.

In some states it is held that where a tenant goes into possession under a contract running for a longer time than that allowed by statute, he thereby becomes a tenant from year to year, that being, as in this state, the longest term allowed for a parol lease. See *Koplitz v. Gustavus*, 48 Wis., 48. *Schuyler v. Leggett*, 2 Cowen, 660. *People v.*

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 Young v. Filley.
 

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*Rickert*, 8 Id., 226. *Lockwood v. Lockwood*, 22 Conn., 425. *Lounsbery v. Snyder*, 31 N. Y., 514. See also, 1 Washburn on Real Estate (4 ed.), 614. 2 Reed on Statute of Frauds, § 810. If the principle is applicable to the case at bar (a question which we do not decide), it is clear that even then plaintiffs in error, having failed to surrender at the end of the first year, and having entered upon the second, would be liable for the rent of the remainder of that year. *Friedhoff v. Smith*, 13 Neb., 5.

The judgment of the district court is affirmed.

### JUDGMENT AFFIRMED.

THE other judges concur.

19	543
29	297
19	543
30	841
19	543
45	302
19	543
52	691

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### WILLIAM YOUNG, PLAINTIFF IN ERROR, V. ELIJAH FILLEY ET AL., DEFENDANTS IN ERROR.

1. **Sale: WARRANTY: DAMAGES.** In an action for damages for a breach of warranty or fraudulent representations as to the quality of personal property sold, where there is no rescission of the contract, the measure of damages is the difference between the value of the property as it actually was and what would have been its value had it been as represented at the time the representation or warranty was made.
2. **Allegata et Probata.** The allegations of the petition and the proof must agree.

ERROR to the district court for Gage county. Tried below before BROADY, J.

*E. O. Kretsinger* and *Bush & Rickards*, for plaintiff in error.

*Hazlett & Bates* and *L. W. Colby*, for defendants in error.

REESE, J.

On the trial of this cause in the district court plaintiff in error objected to the introduction of any testimony by the defendant in error for the reason that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled and this ruling is assigned for error.

The action is one for damages resulting from fraudulent representations and breach of warranty as to the quality of a certain field of standing corn sold by plaintiff in error to defendants in error. The allegations of the petition are substantially that plaintiff (defendant in error) purchased the corn, and that defendant (plaintiff in error) to induce the plaintiff to purchase the same falsely represented that the corn would yield thirty bushels to the acre, and that there was a good stand which had been well cultivated and was good corn. That defendant in error, relying upon such statement, purchased said corn and paid therefor the sum of \$180. It is further alleged that the corn "will" not yield thirty bushels to the acre, nor "is" it a good stand of corn, nor "is" it clean as represented by defendant (plaintiff in error), but that the whole number of said acres "will" not produce over one hundred and twenty-five bushels of corn, and "is" exceedingly thin on the ground and of an inferior quality, and "is" not good corn, and that plaintiff in error knew the representations to be false when he made them, etc. The contract is alleged to have been made on the first day of October, 1881. The petition was verified on the 26th day of the same month and filed on the 3d of May, 1882. In respect to the time at which the defects in the corn existed it must be conceded that the petition is unskillfully and carelessly drawn. In order to recover it must appear that the condition of the corn was not as represented at the time the representations were made. While it might be that a new trial would not be granted for this defect alone,

since the objection was not made before trial, yet such pleading should not be encouraged, and as a new trial may be had the petition should be amended in this particular before such trial is had upon such terms as the district court may order.

It is insisted by defendant in error that the petition alleges both a breach of warranty and fraud, and for the purpose of the case we will assume that such is the fact. In either case where there is no allegation of a rescission of the contract the measure of damages is the difference between the value of the corn as it really was at that time and what it would have been worth had it been as represented. Field on Damages, § 272, *et seq.* *Long v. Clapp*, 15 Neb., 420. *Giffert v. West*, 33 Wis., 617.

The court so instructed the jury, upon the request of plaintiff in error. The trial resulted in a verdict and judgment in favor of defendants in error for \$135.92. There was no evidence introduced showing the real value of the corn at the time of the purchase and payment of the price. There was therefore a want of evidence upon which to base the verdict, and the motion for a new trial should have been sustained.

The defendants in error seem to have tried the case upon the theory that the measure of damages was the amount of the price paid, with interest, and with that view introduced testimony tending to prove that they did not gather any of the crop, but this is at variance with the allegations of the petition. There is no allegation that the corn was worthless, and since defendants in error have not rescinded the contract they can only recover damages under the rule above stated, if anything.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19	546
20	247
19	546
26	731
19	546
245	683

**CHARLES W. LEIGHTON AND HENRY BROWN, PLAINTIFFS  
IN ERROR, v. MARTHA E. STUART, DEFENDANT IN  
ERROR.**

1. **Husband and Wife: SEPARATE PROPERTY OF WIFE.** The property of a married woman, which is her several and separate property, is not liable to levy and sale for the satisfaction of the debts of her husband. Therefore the purchaser of her property at such sale would acquire no title by such purchase, and would not be entitled to the possession of the property as against the owner or one holding a title and claiming under her.
2. **Chattel Mortgage: DESCRIPTION OF PROPERTY.** A chattel mortgage may be void as against the *bona fide* creditors of or purchasers from the mortgagor for defective description of the property mortgaged and yet good as between the immediate parties to the mortgage: Especially where the property included in the mortgage is identified by them.
3. ———: ———. As between the mortgagor and mortgagee of personal chattels, a specific and particular description of the several articles mortgaged, from which to identify them from other like articles of the mortgagor in the same collection, is not essential to the validity of the mortgage.
4. **Res adjudicata:** A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed or affirmed or to be modified or overruled according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart nor the parties release themselves. *Hiatt v. Brooks*, 17 Neb., 33.

ERROR to the district court for Lancaster county. Tried below before MITCHELL, J.

*J. R. Webster*, for plaintiffs in error.

*Ryan Bros. and A. J. Sawyer*, for defendant in error.

REESE, J.

This was an action in replevin instituted by defendant in error, claiming the possession of the property in dispute

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Leighton v. Stuart.

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as the mortgagee of W. W. House and Zeruah C. House, and alleging upon belief that the property in dispute prior to the execution of the mortgage was the separate and individual property of said Zeruah C. House. The cause has been before this court twice before, and is reported in 10 Neb., at page 224, and in 14 Id., at page 37.

The last trial was had before John H. Ames, Esq., referee, who reported his findings of fact and conclusions of law, and upon which judgment was rendered in favor of defendant in error. The findings of the referee are as follows:

#### FINDINGS OF FACT.

"1. That on and prior to the 30th day of October, 1876, one Zeruah C. House was the owner, as of her own separate property and estate, of about sixty-two or sixty-three hogs, of what weight, size, or particular description the evidence does not disclose.

"2. That on the said 30th day of October, 1876, the said Zeruah C. House joined with her husband, W. W. House, in the execution of a certain chattel mortgage to the plaintiff, Martha E. Stuart, in consideration of which the plaintiff at that time loaned and advanced to the said W. W. House, in good faith and reliance upon the security of said mortgagee, the sum of \$490.50, to become due by the terms of the mortgage at the expiration of three months from its date. That L. C. Burr, afterwards and now employed by the defendants Leighton and Brown as one of their attorneys as hereinafter mentioned, was present at the time of the delivery of said mortgage and the advancement of said money, representing one L. E. Kennard. That the said mortgage was duly signed by both of the said mortgagors, but was acknowledged by said W. W. House only, and was filed for record in the clerk's office of Lancaster county, that being the county of the residence of the mortgagors and of the situation of the property in the mortgage de-

scribed, on the 6th day of November, 1876, and was duly refiled in said office on the 3d of November, 1877.

"3. That said mortgage, besides describing other personal property, contained the following description and no other as to hogs: 'Sixty hogs that will average 175 pounds each.'

"4. That on the 25th day of October, 1877, the said W. W. and Zeruah C. House executed a mortgage to the defendant Alexander, to secure the sum of \$50 upon certain brood sows not in controversy in this action.

"5. That on the 6th day of December, 1877, the defendants Leighton and Brown caused two executions to be sued out of the county court of Lancaster county upon two judgments therein recovered by said defendants against the said W. W. House, to be levied upon the hogs described in the petition, together with twenty-three other hogs, all the separate and several property of the said Zeruah C. House, and then in her possession at her residence in said county, where all the hogs mentioned in this report were and had been kept, and that immediately before the making of such levy said Zeruah C. House told L. C. Burr, who was present and personally directed the same on behalf of said defendants, that all the hogs levied upon were her separate property as aforesaid; that the hogs so levied upon were at the time of the levy of about the weight of from 160 to 175 pounds each, but of what age or other particular description the evidence does not disclose. There were in all at the time and place aforesaid, 202 hogs of varying ages, weights, and descriptions; except some five or six brood sows, the hogs were not definitely segregated into separate masses or herds.

"6. That Mr. L. C. Burr was first employed by the defendants Leighton and Brown with reference to the collection of their demands from the said W. W. House not earlier than the 6th day of October, 1877.

"7. That the hogs so levied upon were at and after the



date of the levy considered and treated by the plaintiff and the said Zeruah C. House as being a part of the hogs intended by the phrase in the plaintiff's mortgage "sixty hogs that will average 175 pounds each."

"8. That on the 12th day of December, 1877, the said Zeruah C. House began a proceeding before George K. Amory, then one of the justices of the peace of said county, for the purpose of trying the right of property to the hogs levied upon, which she claimed in said proceeding to belong to her; and that such proceedings were thereupon had that on the 17th day of December, upon a trial before said justice and a jury, in which the said defendants Leighton and Brown participated, it was found and adjudged that the right of property in said hogs was in the said Zeruah C. House, and that said findings and judgment have never been impeached by said defendants, by appeal, petition in error, or otherwise. And said justice thereupon issued an order to the constable directing him to return said hogs to said Zeruah C. House.

"9. That notwithstanding the finding and judgment mentioned in the last preceding paragraph, the constable by whom the executions were levied as aforesaid, at the instance of the said Leighton and Brown, and upon their executing to him a bond of indemnity for so doing, proceeded to advertise the hogs mentioned in the petition in this action for sale pursuant to said levy and so sold the same on the 18th day of December, 1877, to the said Leighton and Brown, "subject to a certain mortgage to one William Alexander for \$50," for the sum in the aggregate of \$168.75.

"10. That at the date of the said execution sales the amount due upon the judgments upon which they were issued was \$180, and at that date the value of the thirty-four hogs sold was \$297.50.

"11. At or prior to the levy of said executions, neither the defendants Leighton and Brown nor said L. C. Burr

had any actual notice of the plaintiffs' mortgage other than as hereinbefore stated.

"12. That on the 19th day of December, 1877, the thirty-four hogs mentioned in the petition were taken from the defendants Leighton and Brown by the sheriff upon the writ of replevin issued in this action and delivered to the plaintiff, who has ever since retained and now retains the same.

"13. That at the beginning of this action the plaintiffs' mortgage was subsisting, unpaid, and unsatisfied."

#### CONCLUSIONS OF LAW.

"1. That the allusion in plaintiff's mortgage to "sixty hogs that will average 175 pounds each" is too indefinite and uncertain to serve as a description imputing notice from the record of the mortgage or otherwise to the defendants Leighton and Brown that the hogs in controversy or any particular hogs were intended to be conveyed thereby or charged with the lien thereof.

"2. That the knowledge of L. C. Burr of the existence of the plaintiff's mortgage, acquired more than a year before his employment by the defendants Leighton and Brown, did not impute knowledge or notice of such mortgage to said defendants at or after such employment at a date more than nine months subsequent to that at which such mortgage, by its terms, became due.

"3. That such mortgage, notwithstanding its indefinite description as to the hogs in controversy, was capable of being treated and regarded as a sufficient description of them by designation, after its execution, as between the plaintiff and the said Zeruah C. House, the owner of them, and as against the creditors of Willis W. House, her husband, and were trespassers, and whether so treated before or after the levy of the executions in favor of the defendants Leighton and Brown was sufficient as against them.

"4. That the right of possession and the right of prop-

erty to the hogs in controversy was at the beginning of this action in the plaintiff, and that she has been damaged by the wrongful detention thereof by the defendants in the sum of one dollar.

"5. That the plaintiff is entitled to a judgment for the possession of the hogs described in the petition, and for damages for the wrongful detention thereof by the defendants in the sum of one dollar and for the costs of this action."

Upon the filing of the report of the referee plaintiffs in error excepted thereto upon the grounds: *First*, To the third conclusion of law because the same was contrary to the law upon the facts found, and because the referee upon the facts found should have found as conclusion of law that the mortgage was void and of no effect as against the plaintiffs in error.

*Second*, To the 4th conclusion of law because the same was contrary to law upon the facts found, and that the referee should have found that the right of property and of possession of the property in dispute was in plaintiffs in error.

*Third*, The general objection to the 5th conclusion of law because it was contrary to law upon the facts found, and the judgment should be in favor of plaintiffs in error.

The exceptions concluded with a motion for judgment in favor of plaintiffs in error.

These exceptions being overruled by the district court, plaintiffs in error moved for a new trial, assigning as ground therefor, that judgment was contrary to law and the facts found. That the judgment, upon the facts found, should be rendered in favor of plaintiffs in error.

This motion being overruled, plaintiffs in error allege error, and seek a review in this court.

By the foregoing it will be seen that no complaint is made by plaintiffs in error as to the findings of fact by the referee. The question presented is, whether or not the facts

as found to exist by the referee, and which must be here taken as correct, will support his conclusions of law.

For the purpose of arriving at what we conceive to be the essential part of this case, it may be noted that the referee finds that the property in dispute was "the separate and several property of the said Zeruah C. House," and that immediately before the levy she notified plaintiffs in error of that fact. Taking this finding as true, which we must, it is clear that the property was not subject to levy for the satisfaction of the debts of W. W. House, her husband. That being true, plaintiffs in error could acquire no title by their purchase, therefore they were not entitled to the possession of the property as against Mrs. House, nor any one holding a title and claiming under her. Was the mortgage void as against a third party, without notice, claiming under or by virtue of the title of Mrs. House? Yes; but as against Mrs. House, no; for the referee finds that the hogs in question "were, at and after the date of the levy, considered and treated by the plaintiff and the said Zeruah C. House as being a part of the hogs" included in the mortgage. As between Mrs. House and defendant in error there was no dispute. As between the immediate parties to the mortgage a specific and particular description of the several articles mortgaged, to identify them from other like articles of the mortgagor, is not necessary. *Call v. Gray*, 37 N. H., 428. *Herman on Chattel Mortgages*, 74. At least not to the same extent as where the rights of *bona fide* creditors of or purchasers from the mortgagor are involved. The mortgage being good as between Mrs. House and defendant in error, it would follow that as against a trespasser the defendant in error could assert her rights to the full extent of the mortgage as fully as Mrs. House could assert her ownership.

In the opinion in this case, 14 Neb., 37, at page 38-9, Chief Justice MAXWELL uses the following language: "The plaintiff claims the property upon two grounds, either

Cole v. Kerr.

of which being found in her favor will entitle her to recover: 1st. That Mrs. House was the owner of the property levied upon, and therefore it was not liable for the debts of her husband." The referee finds, and plaintiffs in error concede, the finding to be correct, that "Mrs. House was the owner of the property." In *Hiatt v. Brooks*, 17 Neb., 33, S. C., 22 N. W. Rep., 73, it was held, and I think correctly, that, "A previous ruling by the appellate court upon a point distinctly made, \* \* \* is a final adjudication, from the consequences of which the court cannot depart nor the parties relieve themselves." While it is believed by the writer that this principle is applicable here, yet, without such application, I have no doubt that the conclusions of law as stated by the referee are fully sustained by his findings of facts.

The judgment of the district court is affirmed.

## JUDGMENT AFFIRMED.

THE other judges concur.

A. V. COLE ET AL., PLAINTIFFS IN ERROR, V. WILLIAM  
KERR, DEFENDANT IN ERROR.

**Chattel Mortgage: DESCRIPTION OF PROPERTY: FUTURE PRODUCTS.** A chattel mortgage executed, delivered, and properly recorded, March 30, 1882, and purporting to convey "one sorrel mule seven years old, one brown mule six years old, \* \* \* forty acres of wheat, thirty acres of oats, now growing, seventy-five acres of corn, to be planted, fifty acres of broom-corn, to be planted, tended, and delivered in Juniata. The above described chattels are now in my possession, on section 1, town 7, range 11 W., Adams county, Nebraska, and are owned by me, and free from all incumbrance in all respects;" *Held*, To convey no title to or lien upon the crop or field of corn raised by the mortgagor on the section of land above described, and levied upon as the property of said mortgagor Nov. 25, 1882, as against a judgment creditor of said mortgagor.

19	553
23	741
19	553
40	772

19	553
57	486
57	487
57	488

19	553
61	771
61	773
61	774

19	553
62	822

ERROR to the district court for Adams county. Tried below before MORRIS, J.

*Dilworth, Smith & Dilworth*, for plaintiffs in error.

*Ragan, McDonald & Shallenberger*, for defendant in error.

COBB, J.

It appears from the bill of exceptions that plaintiff in error Cole obtained a judgment in a justice's court against one John Hildebrand, upon which he caused an execution to issue, and placed it in the hands of plaintiff in error Moreland, who was a constable of the county, and who levied the same upon a quantity of corn raised by said Hildebrand on section 1, in township 7 north, of range 11 west, in the year 1882. That thereupon the defendant in error William Kerr brought an action in the county court of Adams county against Cole and Moreland for the value of said corn, claiming the same by and under a chattel mortgage executed by said John Hildebrand to him, a copy of which is set out in the bill of particulars.

The said Cole and Moreland appeared in said action and answered thereto, and by their said answer put in issue all of the facts necessary to be considered in the disposition of the case. A trial was had in said county court, with a judgment for the plaintiff. The defendants appealed to the district court, and by stipulation went to trial in that court on the same issue as in the county court.

The cause was tried to the court, a jury being waived, which found for the plaintiff in the sum of fifty-eight dollars and sixty cents.

The cause is brought to this court on error by the defendants, and the sole question presented is, did the plaintiff, by virtue of the execution and delivery to him of the

chattel mortgage by Hildebrand and its filing in accordance with the statute, obtain a lien on the corn taken in execution by the defendants which he can enforce against them?

I copy from the mortgage as attached to the bill of particulars the whole description of the property mortgaged. "The following goods, chattels, and property, to-wit: One sorrel mule, 7 years old; one brown mule, 6 years old; one gray horse, 8 years old; three cows with their calves; one white, 7 years old; one red cow, 9 years old; one black and white cow, 3 years old; 25 shoats, average weight 65 pounds; two sets double harness, two lumber wagons, one-half interest in Lewis header, three plows, two harrows, two cultivators, one combined reaper and mower, one grain drill, one seeder, one sulky rake, 40 acres of wheat, 30 acres of oats, now growing, 75 acres of corn, to be planted, 50 acres of broom-corn, to be planted, tended, and delivered in Juniata. The above-described chattels are now in my possession on section 1, township 7, range 11 w., Adams county, Nebraska, and are owned by me and free from incumbrance in all respects." This mortgage bears date the 30th day of March, so that even did it not speak of the 75 acres of corn as yet to be planted, the court would take notice that in this climate Indian corn, the species of grain evidently intended, could not have been successfully planted at the time of the execution of the mortgage.

There is, to say the least of it, great confusion of the authorities on the point being considered, but after a careful examination of those cited on either side in this case I have reached the conclusion that as a question of law the lien of a chattel mortgage of a crop of corn not planted at the time of its execution and delivery will not attach to the corn when it comes into existence until it is seized by the mortgagee, or until, in the language of a member of the court in the case of *Holroyd v. Marshall*, 10 H. of L. Cases, 191, "a new intervening act." Until then it

remains a mere license, and until acted upon it conveys neither a lien nor a right of property which the mortgagee can assert against a purchaser or execution creditor of the mortgagor.

Presumptuous as it may seem to say so, I cannot agree to the proposition stated by Lord Hobart in the case cited by counsel for defendant in error, that the owner of the land, though he had not the future crop "actually in view, nor certain, yet he had it potentially." While it is true, as he adds, that "the land is the mother and root of all fruits," the word potentially, as defined by Craig, means "in possibility, not in act, not positively; in efficacy, not in actuality." With this definition in view it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially. Soil alone does not produce crops of corn in this degenerate age, if it ever did. It now requires in addition to soil, seed and labor, both of man and beast. So that the proposition that a sale or mortgage of a crop of corn not yet planted carries with it a property in or lien upon such crop, to attach and come into efficacy without "a new intervening act," upon the crops coming into existence, carries with it the proposition that a man may mortgage his labor to be performed—something which I never heard contended for in this country, but which is a right which, under the name of peonage, is recognized in our sister republic to the south of us.

The true distinction, I think, is that indicated in 1 Sheppard's Touchstone, 241, in the enumeration of things which pass by grant, to-wit: "Leases for years, be they present or future, wardships of tenants *in capita*, or by knight's service, trees, oxen, horses, plate, household stuff, and the like. Also trees, grass, and corn growing and standing upon the ground, fruit upon the trees, wool upon the sheep's back is grantable." Doubtless the fruit on the trees, the grass in the meadow, and wool on the sheep's



back may be granted without regard to the state of their growth or perfection, because in the due course of time nature without the necessary assistance of new forces will in the one case develop fruit, etc. But, as we have already seen, the mere soil, except with the assistance of other elements and forces, in the latitude of Nebraska will not develop crops of corn. 2. Again, even were the position taken by counsel for defendant in error correct as a question of law, the mortgage under consideration would be void for the want of such description of the corn as would make the record notice to a creditor. By reference to the language of the mortgage it will be seen that the chattels therein described, the mules, cows, wagons, etc., are, with other matters of description, described as being then in the possession of the mortgagor, on section 1, town 7, range 11 west, Adams county, Nebraska. But surely this description can in no sense apply to the corn. The only words of qualification or description which can be held to apply to the 75 acres of corn are that it is to be planted. The 40 acres of wheat and 30 acres of oats are described as being "now growing," and the 50 acres of broom-corn as "to be planted, tended, and delivered in Juniata." The words "to be planted," when used in the month of March, 1882, would apply equally to all crops of corn which might thereafter be found in Adams county. Being planted is a condition through which all fields of corn in existence may be presumed to have passed. So that the record of the mortgage conveyed no notice of the lien or claim of lien of the mortgagee to or upon the corn levied upon by the plaintiff in error.

The judgment of the district court is therefore reversed, and the cause dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

19	558
54	125
55	625

**E. D. WEBSTER, PLAINTIFF IN ERROR, V. J. T. WRAY**  
**DEFENDANT IN ERROR.**

1. **Principal and Agent: ACTS OF AGENTS BINDING: EVIDENCE.**  
 In an action against a third person on a simple non-negotiable contract, it being alleged in the petition that one of the parties to the contract acted as the agent of the defendant in making said contract, although he did not sign the same as agent or name the defendant as his principal, evidence will be received to show that such nominal party to the contract was authorized to make the same for the defendant, that he in fact did make the same for him, and upon such proof the defendant will be held.
2. ———: **NEGOTIABLE INSTRUMENTS.** No party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed.
3. ———: **BANK OFFICERS.** An exception to this rule arises in a case where officers or clerks in banking houses, or other persons who are permitted to act as such, receive money or securities over the bank counter and issue therefor drafts, bills, or negotiable certificates of deposit. In all such cases the banking house is ultimately liable, although such draft, bill, or certificate may be signed by such officer, clerk, or person without disclosing the name of the banking house.

**REHEARING** of case reported 17 Neb., 579.

*Marquett, Deweese & Hall*, for plaintiff in error, cited: *Daniels Neg. Instr.*, §§ 303, 305. *Stackpole v. Arnold*, 11 Mass., 27. *Bradlee v. Boston Glass Manufactory*, 16 Pick., 347. *Webb v. Mouro*, 1 Greene (Iowa), 281. *Pentz v. Stanton*, 10 Wend., 271. *Arnold v. Sprague*, 34 Vt., 409. *Bass v. O'Brien*, 12 Gray, 481.

*J. Byron Jennings*, for defendant in error, cited: *Hopkins v. Lacouture*, 4 La., 65. Story on Agency, §§ 254, 258. *Commercial Bank v. Warren*, 15 N. Y., 577. *Huntington v. Knox*, 7 Cush., 371. *Mechanic's Bank v. Bank of Col.*, 5 Wheat., 326. *Fuller v. Hooper*, 3 Gray, 334. *Nicholl v. Burke*, 78 N. Y., 581.

COBB, J.

This cause came before this court at the January term, 1885, on error to the district court for Hitchcock county. The judgment of the district court was affirmed and the opinion of the court published in the 17th volume of our reports, at page 579. Subsequently a rehearing was allowed and the cause reargued at the present term.

For a statement of the case reference is made to the original opinion, with this correction: The several causes of action contained in the plaintiff's amended petition are there described as contracts, whereas, in point of fact, the first and third of said causes of action were negotiable promissory notes, which are set out and copied in the said amended petition.

The point upon which the rehearing was allowed, and upon which we think the case turns, is, that while in the case of contracts generally, where one of the persons executing the same executes it in his own name, without disclosing his principal, or his own character as an agent, if in point of fact he was acting as the agent of another party, such other party will be held to be the real party to the contract, yet that this rule does not apply to negotiable promissory notes.

This question was ably argued at the bar as well as by exhaustive briefs by counsel on either side.

An examination of the authorities cited by counsel, with others referred to therein, led us all at the consultation to the conclusion that the above proposition as to both its branches expresses the law correctly. Being about to enter upon a collation of authorities upon the point of the non-liability of an unnamed principal upon negotiable paper, my attention was attracted to a citation on page 284, 1 Daniel on Negotiable Ins., to an article in the Albany Law Jour., vol. XIII., No. 19, May 6, 1876, p. 323. This

article I find so exhaustive of the subject that I will content myself by giving the conclusions of the writer and the authorities by him cited. Says our author: "But as to bills of exchange and promissory notes, it has been long settled that *he who takes negotiable paper contracts with him who, on its face, is a party thereto and with no other person.* By Lord Abinger and Parks, 9 Mees. and Welsb., 92, 96. Byles on Bills, 37. Story on Bills, § 76. Edwards on Bills, 80. Hence, evidence is not admissible to charge any other person thereon, upon the grounds of his having been the co-partner or principal of the party named. Metcalf on Contracts, 108. *Draper v. Mass. Steam Heating Co.*, 5 Allen, 340. The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue on a negotiable instrument can be shown by parol evidence (*Fuller v. Hooper*, 3 Gray, 334, per Metcalf, J.), *even as between the immediate parties to the transaction*; and although an agency is disclosed upon the face of the instrument, where the word 'agent' or something equivalent is added to the signature of the party signing the instrument (see cases below), the rule excluding all parol evidence to charge an unnamed principal as a party to negotiable paper is not placed upon the ground that such evidence would contradict or alter the instrument, but this exception to the general rule which governs other parol (or unsealed) agreements *is derived from the nature of negotiable paper*, which, being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the maker as the original payee had, must indicate on its face who the maker is; for any additional liability of the principal not expressed in the form of such a note or bill would not be negotiable. *Barlow v. Congregational Society*, 8 Allen, 460. As between the unnamed principal and a subsequent holder, the reason for the rule in question seems perfectly clear and satisfactory; but as between the immediate parties to the

transaction, does the reason for its application exist? For example, an agent purchases goods, discloses the name of his principal, and having express authority gives the vendor a negotiable promissory note for the price, signing it with his own name alone, without any addition, or, let us say, with the addition of the word 'agent' to his signature. In such a case it is held that the payee cannot recover against the principal upon the instrument, because it is negotiable and his name is not disclosed upon it; but what material difference does it make whether the instrument is negotiable when it has not been negotiated.

"But it must be confessed that the weight of authority, if not of reason, is in favor of the rule excluding all parol evidence, even as between the immediate parties to the transaction. It is held that, although the party executing the instrument describes himself as 'agent,' yet, if the name of the principal is not disclosed upon the face of it, all evidence *dehors* the instrument, for the purpose of holding him thereon, is to be excluded. It is wholly immaterial, therefore, that the agent had full authority to make it in behalf of his principal; that the consideration was exclusively received for his benefit; that the plaintiff knew the agent's principal, and accepted the note as the promise of the principal. *Williams v. Robbins*, 16 Gray, 77. *Slawson v. Loring*, 5 Allen, 340. See also *Stackpole v. Arnold*, 11 Mass., 27. *Brown v. Parker*, 7 Allen, 337. *Bedford Com. Ins. Co. v. Covell*, 8 Metc., 442. *Bass v. O'Brien*, 12 Gray, 477. *Pentz v. Stanton*, 10 Wend., 271. *Thurston v. Mauro*, 1 Greene (Iowa), 231. *Kenyon v. Williams*, 19 Ind., 45. *Anderton v. Shoup*, 17 Ohio S., 125. *Taber v. Cannon*, 8 Metc., 456. *East R. R. Co. v. Benedict*, 5 Gray, 561. *Bank of America v. Hooper*, Ib., 567. *De Witt v. Walton*, 5 Seld., 571. And *Tucker Manf. Co. v. Fairbanks*, 98 Mass., 101."

No fault can be found with the opinion and decision of the court, so far as the second and fourth causes of action

are concerned. But in regard to the first and third causes of action we failed to distinguish between simple contracts in general and negotiable paper.

Upon reargument and reconsideration of the authorities, we reach the conclusion that the district court erred in admitting evidence on the trial introduced by the plaintiff for the purpose of showing that T. B. Webster executed and delivered the promissory notes set out in the first and third causes of action in the amended petition of the plaintiff in said court as the agent or partner of E. D. Webster, and in holding said E. D. Webster thereon.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

19	562
39	370
19	562
36	687

THE STATE OF NEBRASKA, EX REL. JEROME COOK AND  
JOSEPH VAN VOLIN, V. WILLIAM S. BLOOM, TREAS-  
URER.

**School District Money.** Money can be drawn from the treasury of a school district only by orders on the treasurer signed by the director and countersigned by the moderator.

ORIGINAL application for mandamus.

*John M. Ragan* and *D. W. Barker*, for relator.

*Case & McNeny*, for respondent.

MAXWELL, CH. J.

This is an application for a mandamus to compel the defendant to pay a certain school order of which the following is a copy:

"\$3,000.00.

"STATE OF NEBRASKA,  
NUCKOLLS COUNTY, January 15th, 1886. }

"Treasurer of school district No. 11, of Nuckolls county, Nebraska: Pay to the order of assignees of J. T. Donahoo, Messrs. Cook and Van Volin, the sum of ~~three~~ thousand dollars, as per contract, out of any money in your ~~hands~~ belonging to the fund for building.

"GEORGE BROWN, *Supt. Architect.*

"GEO. F. COLTON, *Director.*

"Countersigned,

"G. L. DAY, *Moderator.*"

The facts in the case, as they appear from the record, are briefly these: That on the 19th of August, 1885, one James T. Donahoo entered into a contract with the proper officers of school district eleven, of Nuckolls county, to erect a school building in said district according to certain plans and specifications prepared by an architect; that said work was to be completed according to the plans and specifications, and to the satisfaction of the architect. The price to be paid said Donahoo was \$11,800, to be paid as follows: Two thousand dollars when the basement was completed, and the first floor joists laid; \$2,000 when the first story was erected, and the second floor joists laid; \$3,000 when the building was enclosed, and the roof put on, and the remainder, being \$4,800, when the building was completed and accepted. To secure the performance of the contract Donahoo gave a bond to the district in the sum of \$15,000, with the relators as sureties. Donahoo completed the basement and the first story, and laid the joists for the second floor, all of such work being done to the satisfaction of the architect, and obtained warrants on the defendant for \$4,000, which were paid. Donahoo then went to his sureties and stated to them that he was unable to complete the contract, and thereupon the sureties took an assignment of the contract to themselves, and with

the assent of the school board entered upon the completion of the building, and on enclosing the same and putting on the roof the warrant in question was drawn on the defendant, who refused to pay the same, principally on the ground that Donahoo had drawn his personal orders to an amount in excess of \$2,600 on said fund, which orders had been paid. The following is a copy of one of the orders:

"\$1,000.

CITIZEN'S BANK,  
SUPERIOR, NEB., Oct. 15th, 1885. }

"At sight pay to the order of Citizen's Bank one thousand dollars, with exchange, value received, and charge same to account of

"JAS. T. DONAHOO.

"To W. S. Bloom, Treasurer S. D. No. 11, Superior, Neb."

The question presented is, does the payment of these personal drafts to Donahoo constitute any defense to this action? We think not. The contract provides the terms and conditions on which the contractor was to be paid and the treasurer has not the power to change the same. If he pays out money upon the personal obligations of a party he does so at his peril.

Sec. 16, subdivision 4, chap. 79, Comp. St., provides that, the director "shall draw and sign all orders upon the treasurer for all moneys to be *disbursed by the district*, and all warrants upon the county treasurer for moneys raised for district purposes, or apportioned to the district by the county superintendent, and present the same to the moderator to be countersigned by him, and no warrant shall be issued until so countersigned. No warrant shall be countersigned by the moderator until the amount for which the warrant is drawn is written upon its face. The moderator shall keep a record in a book furnished by the district of the amount, date, purpose for which drawn, and name of person to whom issued of each warrant countersigned by him."



Section 5 of the same subdivision and chapter provides that, "It shall be the duty of the treasurer of each district to apply for and receive from the county treasurer all school moneys apportioned to the district or collected for the same by said county treasurer, upon order of the director, *countersigned by the moderator*, and to pay over on the order of the director, *countersigned by the moderator* of such district, all moneys received by him."

These provisions are decisive of this case, and the payment by the defendant of Donahoo's drafts is no defense to this action. And as it appears that there are sufficient funds in the hands of the treasurer belonging to the district to pay the order in question a peremptory writ will issue as prayed.

Since the opinion in this case was prepared, the attorneys for the defendant have called the attention of the court to section 11, subdivision 3, chap. 79, Comp. St., which provides that certain disputed matters shall be referred to the county superintendent, who, if necessary, shall apply for a mandamus. This, however, will not prevent a party in a proper case from bringing an action in his own name. We are also referred to *School District v. Collins*, 16 Kan., 406, which we do not think applicable to the facts in this case.

WRIT AWARDED.

THE other judges concur.

19 566  
27 494  
19 566  
28 747

LEONARD MORSE, PLAINTIFF, v. THE COUNTY OF  
HITCHCOCK AND WILLIAM H. TRITES, TREASURER,  
DEFENDANTS.

1. **Counties: ATTACHED TERRITORY: TAXES.** Where an unorganized county is attached to an organized one for election, judicial, and revenue purposes, and the proper officers of the organized county levy taxes upon the property in the unorganized one, and prior to the time such taxes become due the unorganized county becomes organized by the election and qualification of the proper officers, such taxes are to be paid to the treasurer of the new county. *F., E. & Mo. V. E. Co. v. County of Brown*, 26 N. W. R., 194, adhered to.
2. ———: **NEW COUNTIES: RECORDS.** It is the duty of the clerk of the new county to take or procure a transcript of all deeds, mortgages, judgments, and liens of every description upon real or personal property lying and being in the newly organized county.
3. **Estoppel.** Plea of former adjudication, *Held*, Not sustained.
4. **Counties: MANDAMUS.** A mere tax payer cannot, in the first instance at least, institute proceedings against the county clerk of the county to which the new county was attached to compel him to furnish a transcript of deeds, mortgages, judgments, etc. *State v. Sovereign*, 17 Neb., 173.

ORIGINAL application for injunction in proceedings relating to the revenue.

*George W. Doane*, for plaintiff.

*J. Byron Jennings*, for defendants.

MAXWELL, CH. J.

This is an action to restrain the treasurer of Hitchcock county from selling certain real estate of the plaintiff in Dundy county for taxes levied by the authorities of Hitchcock county before Dundy county was organized, and to compel the authorities of Hitchcock county to permit the

clerk of Dundy county to copy the tax books, etc., of Hitchcock county for the year 1884, so far as they relate to property within the limits of Dundy county, or furnish a transcript thereof to said clerk.

The conceded facts are substantially as follows: The plaintiff is a resident of and elector of Dundy county; the county of Hitchcock, in the year 1884, had been duly organized for a number of years, and Dundy county had been, and on the 11th day of June, 1884, was, attached to Hitchcock county for election, judicial, and revenue purposes. On the day last named the county commissioners of Hitchcock county levied taxes for that year upon all the taxable property in Hitchcock and Dundy counties. A few days after said taxes were levied the county of Dundy was duly organized by the election and qualifying of the proper county officers, and it thereupon became and now is one of the organized counties of the state. The plaintiff at that time was the owner of the north-west quarter of section twenty-five, township one north, of range thirty-eight west, in Dundy county, and on or about the 6th day of August, 1885, paid to the treasurer of Dundy county the taxes due on said land for the year 1884, which taxes the treasurer of Hitchcock county also claims, and unless restrained will sell the land in question to satisfy the same.

The first question presented, viz., the right of the new county when organized to collect taxes levied by the county to which it was attached for election, judicial, and revenue purposes, was decided by this court in *F., E. & Mo. V. R. Co. v. County of Brown*, 26 N. W. R., 194; and it was held that when the new county was organized by the election and qualifying of its officers, it became to all intents and purposes one of the counties of the state, and all county business must thereafter be transacted with its officers. This, we think, is a correct interpretation of the statute. Why elect county officers and require them to give bonds if the duties of such offices are still to be per-

formed in whole or in part by the officers of the county to which it was attached? The county clerk of the new county is required to procure from the proper officers of the county to which it was attached "a transcript of all deeds, mortgages, judgments, and *liens of every description* upon real or personal property lying and being in such newly organized county, and cause the same to be recorded in the proper offices of his own county." This language is certainly broad enough to include tax liens. The records are transcribed for the express purpose of being used in the new county, and the taxes due on the property in the new county are to be paid to its treasurer to enable it to meet legitimate demands. We adhere, therefore, to the decision in *F., E. & Mo. V. R. Co. v. County of Brown*, and the defendant has no authority to sell the plaintiff's land for the taxes in question. And as this action relates to the revenue the court has original jurisdiction, and the injunction will be granted as prayed.

2. That the defendant be permitted to copy from the records of Hitchcock county all deeds, mortgages, judgments, and liens of every description upon real or personal property lying and being in Dundy county. The right to take such copies is expressly conferred by statute, and in a proper proceeding this court would compel a compliance with the law. Such an action, however, must be instituted by the county clerk. The statute expressly enjoins this duty upon him. It is claimed that the clerk of Dundy county did institute proceedings against the county clerk of Hitchcock county to obtain a transcript as required by law, and that on the hearing in the district court judgment was rendered in favor of the defendant and the action dismissed, and this judgment is now pleaded as a former adjudication. Whether the public can be debarred of a plain right given by statute we need not now stop to enquire, as we find on examining the record that the county clerk of Dundy county demanded of the clerk of Hitch-

Caldwell v. City of Lincoln.

cock county a transcript of all matters in said county which affected property in Dundy county. This the court refused to compel, probably for the reason that the clerk of Dundy county had an adequate remedy at law—the right to take such transcript himself. The judgment, therefore, is not a prior adjudication of the same matter. A mere tax payer, however, cannot, in the first instance at least, institute proceedings to compel the clerk of Hitchcock county to comply with the statute. *State v. Sovereign*, 17 Neb., 173. The second ground upon which relief is sought must therefore be decided adversely to the plaintiff.

JUDGMENT ACCORDINGLY.

THE other judges concur.

**JAMES L. CALDWELL, PLAINTIFF IN ERROR, v. THE  
CITY OF LINCOLN, DEFENDANT IN ERROR.**

19	569
30	884
19	569
158	43

1. **Municipal Corporations: OCCUPATION TAX.** While cities of the second class having more than five thousand inhabitants have authority to impose a tax on any occupation or business within the limits of the city, yet such ordinances must be so framed as to make such taxes uniform in respect to the classes upon which they are imposed; and such taxes must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business.
2. ———: ———. The power to impose taxes is derived alone from the statute, and must be expressly conferred or be necessarily implied.
3. ———: **RECOVERY OF TAXES PAID UNDER PROTEST.** The right to recover under the statute illegal taxes paid under protest, *Held*, Applicable to a business tax collected under a void ordinance.

**ERROR** to the district court for Lancaster county. Tried below before POUND and MITCHELL, J.J.

*J. L. Caldwell, pro se.*

*A. W. Field, for defendant in error.*

MAXWELL, CH. J.

This action is brought by the plaintiff as assignee of one John Waugh, to recover from the defendant the sum of \$120, paid under protest for license tax unlawfully exacted. The defendant demurred to the petition and the demurrer was sustained in the court below and the action dismissed. The following is a copy of the petition:

"The plaintiff complains of the defendant and says the defendant is a city of the 2d class, duly organized under the laws of Nebraska, and had on November 20th, A.D. 1883, more than ten thousand inhabitants.

"That in the month of November, A.D. 1883, the mayor and councilmen of the said city of Lincoln pretended to pass, and on November 20th passed, and on November 30th, 1883, approved a certain pretended paper or ordinance in writing, and have caused the same to be published as a valid ordinance of the said city of Lincoln on page 78, Revised Ordinances of 1884, and have instructed their police officers to enforce its provisions, which said ordinance reads as follows, to-wit:

"AN ORDINANCE

"To provide for licensing the sale of bankrupt or other stocks of goods, wares, or merchandise, to be sold or exposed for sale at auction, within the corporate limits of the city of Lincoln.

"Be it ordained by the mayor and councilmen of the city of Lincoln:

"Section 1. *Unlawful to sell without license.* It shall be unlawful for any person or persons to sell or expose for sale at public or private auction in the city of Lincoln, any

bankrupt or other stock of goods, wares, or merchandise of any character whatever, or for any person or persons, or commission merchants to receive any such stock of goods, wares, or merchandise for the purpose of selling or exposing the same for sale within the limits of said city at public or private auction, without having first procured a license so to do, which said license shall be issued by the clerk of said city on presentation of the receipt of the city treasurer for money paid as provided in section two hereof. Said license shall be signed by the mayor and clerk and be attested by the seal of said city. *Provided*, That the provisions of this act shall not apply to live stock.

"Section 2.—*Cost of temporary license.*—Any person desiring to conduct the business of selling at auction in the city of Lincoln, any bankrupt or other stock of goods, wares, or merchandise, shall first pay to the city treasurer the sum of twelve dollars for each day said business shall be carried on. *Provided*, No license shall be granted for a shorter time than ten days.

"Section 3.—*What license shall specify.*—Every such license shall specify the character of the goods to be sold and the place where said business is to be carried on.

"Section 4.—*Licensee cannot act as auctioneer.*—The license obtained under this ordinance shall not authorize the holder thereof to act as auctioneer.

"Section 5.—*Penalty.*—Any person who shall violate any of the provisions of this ordinance, shall for each offense be fined in any sum not less than fifty dollars, nor more than one hundred dollars, and to be committed until said fine and costs are paid.

"Section 6.—*Ordinances repealed.*—All ordinances and parts of ordinances in conflict herewith are hereby repealed, and this ordinance shall take effect and be in force from and after its passage, approval, and publication according to law.

"Passed November 26, 1883. Approved November 30, 1883.

"That on the 13th day of December, 1883, one John Waugh was the owner of a stock of goods in Webster's block in the city of Lincoln. That said stock of goods had been opened up and offered for sale since November 1, 1883; at retail prior to November 26, 1883. And that a few days prior to that date said owner decided to close out the said stock of goods at public auction to pay debts then past due. That after and before the commencement of the said auction sales, a number of retail dealers in fancy goods and notions conspired together to prohibit the said auction sale, and all auction sales in said city, and went before the said mayor and councilmen and requested and procured the passage of said pretended ordinance.

"That the police officers of said city of Lincoln, acting under the instructions of the mayor and council of said city, on the 13th day of December, 1883, while the said owner was proceeding with his sale with a duly *licensed auctioneer* of the said city, went into the store and commanded him to stop the sale or take out a license or they would arrest him, and declared the auction sale closed until a license was procured as provided by the terms of said pretended ordinance.

"That to avoid the entire loss of the remaining portion of said stock of goods, the said owner deposited under protest one hundred and twenty (120) dollars with the treasurer of said city and caused to be written on the face of the receipt "Paid under protest." That he presented said receipt to the city clerk of Lincoln and was given a paper writing of license in the words and figures following, to-wit:

"Having paid the sum of one hundred and twenty dollars, the amount required by ordinance, license is hereby granted to John Waugh, to sell general merchandise at Webster's block, 11th st., bet. N and M, in said city, for 10 days, subject to the ordinance of said city.

[L. S.]

Dated Dec. 13th, 1883.

R. C. MANLEY,

City Clerk.



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Caldwell v. City of Lincoln.

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"(Endorsed.) In consideration of one hundred and twenty dollars I hereby assign the claim of \$120 which I have against the city of Lincoln, Lancaster county, Nebraska, to W. J. Houston.

"JOHN WAUGH.

"I assign this to J. L. Caldwell.

"W. J. HOUSTON."

"Filed January 30, 1885.

"Recommended not allowed by city attorney, and his recommendation adopted March 16th, 1885.

"R. C. MANLEY,

*"City Clerk."*

"That J. L. Caldwell is the owner and holder of said owner's right to demand the payment of said sum of one hundred and twenty (120) dollars.

"That demand for payment has been made to the mayor and councilmen of said city of Lincoln, and payment refused. That no part of said claim has been paid, and by said refusal to pay him said sum of money said J. L. Caldwell is damaged in the sum of one hundred and twenty dollars."

Two questions are presented: 1st. The validity of the ordinance. 2d. In case the ordinance is held invalid, the right of the plaintiff to recover back the money paid.

Lincoln is a city of the second class, containing more than five thousand inhabitants, and the special provisions in the act creating such cities control as to the powers of the city government. Comp. Stat., ch. 14, art. II.

Subdivision VIII. of section 52 of the act creating and providing for the government of such cities, confers the power to impose such taxes as follows: "To raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city, and regulate the same by ordinance; and such taxes shall be uniform in respect to the classes upon which they may be imposed; *Provided, however,* That all scientific and literary lectures

and entertainments shall be exempt from taxation, as well as concerts and other musical entertainments given exclusively by citizens of the city." This is the only authority we find in the statute for the imposition of a license tax. It will be observed that such taxes are to be uniform as to the classes upon which they are imposed. The title of the ordinance, however, is not to license an occupation or business, nor is there any provision in the ordinance itself for the issuing of a license for a longer period than ten days. That the city of Lincoln has authority to impose a license tax upon auctioneers within the city, there is no doubt, and it may impose the same kind of taxes upon merchants and others within the city who engage in the business of selling goods at auction, but it must do so by general ordinance, in which all persons who engage in the business are treated alike, and the tax is to be upon the occupation or business. This is not attempted to be done in the case under consideration.

Section one provides that, "it shall be unlawful for any person or persons to sell or expose for sale at public or private auction in the city of Lincoln any bankrupt or other stock of goods, wares, or merchandise of *any character whatever*, or for any person or persons or commission merchants to *receive* any such stock of goods, wares, and merchandise for the purpose of selling or exposing the same for sale," etc. Without discussing the provision prohibiting merchants or other persons from receiving goods, wares, and merchandise which it was proposed to sell at auction, it is apparent that the ordinance extends far beyond the power of the city council and mayor in levying taxes upon occupations or business. It is a principle universally declared that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. The authority must be given either by express words or by necessary implication, and it cannot be de-

duced from any consideration of convenience or advantage. Dillon Mun. Cor., § 605. The business of an auctioneer is a lawful and useful one, and that of selling goods at auction is supposed to be, and an ordinance taxing the business must be so framed as to provide for all persons who desire to engage in the business, either from year to year or temporarily; but it must be in the nature of a tax, and not so oppressive as to prohibit, and must be reasonable, considering the nature of the business or occupation. The ordinance in this case is clearly in conflict with both of these principles, and is void.

2. Can the plaintiff recover the money thus paid back? The allegation in the petition is, in substance, that the police of the city, acting under the direction of the mayor and city council, while the sale was proceeding under a licensed auctioneer of the city, went into the store and ordered Waugh to stop the sale or take out a license, and threatened to arrest him, and declared the auction sale closed until a license was procured; that to avoid the entire loss of the remaining portion of his goods he deposited one hundred and twenty dollars with the treasurer and took his receipt, and there was written on the face of the receipt, "Paid under protest." Without entering into a general discussion of the question of the right to recover back money paid under protest, it is evident that section 144 of chap. 77, Comp. St., applies in this case. The language is general, and provides that, "in *every case* the person or persons claiming any tax or any part thereof to be for any reason invalid, who shall pay the same to the tax collector or other proper authority in all respects as though the same was legal and valid, such person may at any within thirty days after such payment demand the same, in writing, from the treasurer of the state, or of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied," etc.; and if the sum thus

collected for an illegal tax is not paid within ninety days the party may bring an action to recover it. When this claim was presented to the city council does not appear, nor can that objection be interposed by demurrer. *Mills v. Rice*, 3 Neb., 76. Whether the failure to present the claim to the city council would affect the right to recover in any case, or only the question of costs, is not now before the court, and will not be considered. It is evident that the petition states a cause of action, and the demurrer should have been overruled.

The judgment is therefore reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19	576
28	144
19	576
41	282
19	576
42	715

M. H. BOWERS, PLAINTIFF IN ERROR, V. W. A. RICE,  
DEFENDANT IN ERROR.

1. **Verdict.** When by the verdict either party is entitled to recover money from the adverse party, the jury in their verdict must assess the amount of recovery.
2. —: **JUDGMENT.** A verdict in an action to recover money was in the following form: "We, the jury, duly impaneled and sworn, do say that we find for the plaintiff." *Held*, Not to authorize a judgment for any sum whatever.

ERROR to the district court for Franklin county. Tried below before GASLIN, J.

*E. A. Fletcher*, for plaintiff in error.

*H. Whitmore*, for defendant in error.

MAXWELL, CH. J.

This is a petition in error to reverse the judgment of the district court of Franklin county reversing the judgment of a justice of the peace.

It appears from the record that in December, 1884, the plaintiff brought an action before a justice of the peace to recover from the defendant the value of a horse.

The facts are substantially as follows: That in January, 1884, the defendant sold to one William B. Carpenter the horse in controversy; that in March, 1884, Carpenter sold said horse to the plaintiff; that in each of said sales the price paid for the horse was \$80; that afterwards one Rachel A. Hendricks claimed the horse in question by virtue of a chattel mortgage executed by a former owner of the horse prior to the purchase of the same by the defendant, which mortgage was duly recorded; that Hendricks recovered the horse from the plaintiff in an action of replevin. The plaintiff thereupon recovered a judgment against Carpenter for the sum of \$120, the value of the horse and damages. Carpenter thereupon transferred his right of action against the defendant to the plaintiff to satisfy the judgment against himself. The plaintiff then brought this action upon said claim to recover the sum of \$120, the value of the horse, with damages and costs. The defendant set up no counter-claim or set-off. On the trial of the cause the jury returned a verdict as follows: "We, the jury, being impaneled and sworn, do say that we find for plaintiff." The justice thereupon rendered judgment against the defendant and in favor of the plaintiff for the sum of \$120 and costs. The defendant then took the cause on error to the district court, where the judgment of the justice was reversed and the cause held for trial, and this is the error complained of. The question presented is the authority of the justice to

render judgment for any sum whatever upon the verdict in question.

Section 295 of the code, which is applicable to cases arising before justices of the peace, provides that, "When by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery." As the jury in their verdict made no finding that any sum whatever was due from the defendant to the plaintiff, there was no authority for the justice to render judgment for any sum whatever. *Ames v. Sloat*, Wright's Rep., 577. *Black v. Winterstein*, 6 Neb., 224. The district court did not err, therefore, in reversing the judgment of the justice and holding the case for trial. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOHN B. ALLEN, PLAINTIFF IN ERROR, V. DEWITT VAN  
OSTRAND, DEFENDANT IN ERROR.

1. **Herd Law: NOTICE.** Where stock is taken up under the herd law and notice served on the owner, he has forty-eight hours after receiving the notice to pay the damages and costs and take the stock away.
2. ———: **DAMAGES.** There is no provision in the statute for adding to the damages claimed after the service of notice.
3. ———: **REPLEVIN.** A took up certain stock of B and served a notice on B, stating the amount of damages claimed. About twenty-four hours afterward B went to the residence of A—their farms adjoining—and tendered to A the amount of damages stated in the notice and demanded his stock. A thereupon demanded an additional sum for keeping the same since the service of notice. This was refused. About 9 o'clock P.M.

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Allen v. Van Ostrand.

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of the same day, and before proceedings in replevin were instituted, A went to the residence of B and notified him to take away his stock and pay him (A) the amount first claimed; *Held*, That A did not thereafter wrongfully detain the stock.

ERROR to the district court for York county. Tried below before NORVAL, J.

*France & Harlan*, for plaintiff in error.

*Sedgwick & Power*, for defendant in error.

MAXWELL, CH. J.

This is an action of replevin brought by the plaintiff against the defendant to recover the possession of "two red steers and one red heifer, each about eight months old, and one red heifer with white face, one year old."

On the trial of the cause in the court below the defendant was found to be entitled to the possession of the property, and the value of such possession the court fixed at the sum of \$2.00, with damages for the detention of the property.

The undisputed facts as they appear from the testimony are as follows: That in April, 1884, the plaintiff and defendant resided on adjoining farms about seven miles from the town of York; that the plaintiff was the owner of the stock in question, and on or about the 20th of that month it strayed on to the farm of the defendant. The defendant thereupon took up the stock and served the statutory notice on the plaintiff, claiming \$2.00 damages and requiring him to pay said sum and take his stock away within forty-eight hours, and naming an arbitrator in case he was dissatisfied with the damages claimed. The notice seems to have been served about 6 o'clock in the afternoon. On the next day at about the same hour the plaintiff went to the defendant's residence and offered to pay the \$2.00 demanded and claimed his stock. The defendant then asked

for \$1.00 in addition to the sum demanded in the notice for keeping the stock one day. This the plaintiff refused to pay. After some further conversation the plaintiff again offered the defendant \$2.00, but he again refused to receive it. The same evening, however, about 9 o'clock, the defendant went to the residence of the plaintiff and notified him that he "could come up and get the cattle and pay him the \$2.00." The plaintiff testifies, "I told him no, I had been there and twice offered him the money, and I told him if he would bring the cattle down to my place he could have his \$2.00, and he said he would not bring them down." On the next day this action was commenced and the cattle taken under an order of replevin. The \$2.00 seems to have been deposited with the justice for the use of the defendant, but in the view we take of the case it is entirely immaterial whether the money was so deposited or not.

The notice in this case seems to be in the form prescribed in section 2, chap. 2, Compiled Statutes, and as the plaintiff failed for forty-eight hours to appoint an arbitrator to assess the damages, the amount claimed must be considered as satisfactory to him. There is no dispute, therefore, over the amount of damages, nor over the right of the defendant in the first instance to retain the stock until the damages were paid. Therefore, had the plaintiff immediately on tendering to the defendant the amount of damages claimed in the notice, which he refused to receive, brought an action of replevin, his right to maintain the action would be unquestioned; but when the defendant notified him before the action was brought to take his cattle away, and that he would accept the amount tendered, it was the duty of plaintiff to comply with the request, and the defendant was not then wrongfully holding possession. The defendant may have supposed, and probably did, that he was entitled to compensation for each day he kept the stock until the expiration of forty-eight hours



Crute v. Wray.

from the time the notice was served, and that the sum could be added to the damages claimed. But there is no provision in the statute for such compensation. The statute gives the owner forty-eight hours after receiving the notice in which to take the stock away and make full payment of all damages and costs. The amount of damages claimed must be stated in the notice, and there is no provision for additional claim to that first made. The plaintiff, however, upon the payment of the sum claimed could have obtained his cattle, and they were not *then* wrongfully withheld. As the plaintiff and defendant resided on adjoining farms the cost of going after the cattle a second time would be inconsiderable, and no point is made on that by either party.

It is evident that a little forbearance on the part of both of these parties, certainly on that of the plaintiff, would have secured him all his rights in the premises without the expense and annoyance of a suit that should never have been brought.

There is no error in the record, and the judgment is affirmed.

## JUDGMENT AFFIRMED.

THE other judges concur.

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JOHN CRUTE, PLAINTIFF IN ERROR, V. JOHN W. WRAY,  
DEFENDANT IN ERROR.

1. **New Trial: MOTION.** The rule laid down in former decisions, that a motion for a new trial must be made in the court below in order to entitle a party to a review of the case by petition in error, where the alleged errors occurred upon the trial of the cause, adhered to.

19	581
28	98
28	314
19	581
33	34
33	275
19	581
29	91
19	581
31	584
19	581
36	238
19	581
38	210
19	581
40	398
41	196
19	581
43	615
19	581
49	529
19	581
159	348

2. **Replevin: SPECIAL OWNERSHIP: DAMAGES.** In an action of replevin where the verdict is in favor of the defendant, whose ownership is special by reason of a chattel mortgage or other lien, the measure of his damages in case a return cannot be had is the amount due him upon his lien, if within the value of the property as found by the jury. But such damages should in no case exceed the value of the property.

ERROR to the district court for Hitchcock county.

*Jennings & Starbuck*, for plaintiff in error.

*Lucas & Le Hew*, for defendant in error.

REESE, J.

This was an action of replevin. Plaintiff being defeated in the district court brings the cause into this court for review by proceedings in error. There was no motion for a new trial, and hence we cannot examine as to any of the alleged errors which occurred prior to the rendition of the judgment. This is fully settled by the adjudications of this court and must be adhered to. *Cropsey v. Wiggenghorn*, 3 Neb., 108. *Singleton v. Boyle*, 4 Id., 414. *Horacek v. Keebler*, 5 Id., 356. *Hosford v. Stone*, 6 Id., 380.

The verdict of the jury was as follows (omitting title of the case):

"We, the jury in this case, being duly empaneled and sworn, do find and say, that at the time of the commencement of this case the defendant had a special ownership and property in the horse in question to the amount of \$78. That said defendant was and is now entitled to the immediate possession of said horse. That said defendant is entitled to recover of and from said plaintiff one cent damages for wrongful taking the same, and that said horse is of the value of \$65."

The judgment, after reciting the verdict of the jury, was as follows:

"It is therefore considered by the court that the defendant have a return of the property taken on said writ of replevin, or in case a return of said property cannot be had, that he recover of said plaintiff a special ownership and property in said horse, assessed at \$78, and his damage for withholding the same, assessed at one cent, and costs of suit, taxed at \$27.18."

It will be seen that the judgment is for \$13 more than the actual value of the property. Section 191a of the civil code provides that the judgment "shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same," etc. The true measure of damages is the value of the right of possession within the value of the property. The jury found the value of the possession to be \$78. They also found the value of the property to be \$65. This verdict complied with the requirements of section 191 of the civil code, and afforded all the *data* necessary upon which to render a correct judgment, which should have been for a return of the property, and in case a return could not be had then the value of the possession, which could not exceed the actual value of the property. *Welton v. Bellezore*, 17 Neb., 402. *Wells on Replevin*, § 593. *Jennings v. Johnson*, 17 Ohio, 154. *Sutcliffe v. Dohrman*, 18 Id., 186. *Coe v. Peacock*, 14 Ohio St., 187.

The judgment being excessive, it will be reversed, and a new trial ordered, unless the defendant enter a remittitur for all in excess of \$65 within thirty days. In case such remittitur is filed, the judgment will be affirmed for that amount.

JUDGMENT ACCORDINGLY.

THE other judges concur.

**SAMUEL O'BRIEN, PLAINTIFF IN ERROR, V. NANCY  
O'BRIEN, DEFENDANT IN ERROR.**

1. **DIVORCE: MODIFYING DECREE.** An application to modify a decree of divorce is a special proceeding within the meaning of section 581 of the civil code, and an order made therein affecting a substantial right may be reviewed on error. In such case it is not necessary to a review that the order complained of terminates the action or prevents a judgment.
2. ———: **ALIMONY.** In such case, where the divorced wife seeks a modification of the decree for alimony, alleging that the decree was obtained by the fraud of the husband and his agents, the district court has authority to require the husband to pay into court a reasonable sum of money, to enable her to prosecute her action.

**ERROR** to the district court for Dodge county. Tried below before POST, J.

*N. H. Bell*, for plaintiff in error.

*C. Hollenbeck*, for defendant in error.

**REESE, J.**

In April, 1883, defendant in error obtained a decree of divorce from plaintiff in error. In that action she was awarded both temporary and permanent alimony and the custody of the minor children of the parties. In May, 1884, plaintiff filed his petition in the same court, alleging the foregoing facts, and that defendant had become an unfit person to have the custody of the children, and asking a modification of the decree to the extent that, owing to his fitness to take charge of the children, and his ability to provide for them, he be given their custody. It is unnecessary to set out here the allegations of the petition. It is sufficient to say that enough is stated, if true, to require the modification.

Defendant answered, denying the charges made against her, and alleged, substantially, that plaintiff was a man of bad morals and habits, and not a fit person to have the custody of the children. She further alleged that plaintiff, by taking advantage of her destitute condition, and by fraudulent representations, induced her to consent to her former allowance of alimony, which was inadequate and much too small; and by his conduct since the divorce was granted he had involved her in litigation until her means were exhausted, and she was unable, for want of such means, to take the necessary testimony to refute the charges made against her and her character, and prosecute her defense. She asked for temporary alimony, or suit money, to enable her to do so. The district court made an order requiring plaintiff to pay to her the sum of \$50, "as temporary allowance for suit money, and to enable her to properly defend" the action. For the purpose of a review of this order, plaintiff brings error.

The first question requiring our attention is presented by defendant by a motion to dismiss the proceedings in error, for the reason that the order of the district court was not such a final order as can be reviewed by proceedings in error.

Section 581 of the civil code provides that, "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified, or reversed, as provided in this title."

Applying the provisions of this section to the case at bar, it is clear that no authority for review is found in the first clause of the section, as the order complained of neither determined the action nor prevented a judgment. We next inquire whether this is a special proceeding, and whether the order complained of is one affecting a substantial right.

As this is not an original action, but a proceeding specially provided by sections 15 and 16 of chapter 25 of the Compiled Statutes of 1885, it must be apparent that it falls directly within the provisions of section 16. These sections are as follows:

"Sec. 15. Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents the children, or any of them shall remain.

"Sec. 16. The court may, from time to time, afterwards, on the petition of either of the parents, revise and alter such decree concerning the care, custody, and maintenance of the children, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require."

This action must therefore be held as a special proceeding, and the order one affecting a substantial right therein, and is open to review by this court. It differs from *Aspinwall v. Aspinwall*, 18 Neb., 463, S. C., 25 N. W. Rep., 623, in this, that the appeal in that case was taken from an order allowing alimony in the original action for a divorce, which order is especially provided for by section 12 of chapter 25, *supra*, and was made "in an action," but it neither "determined the action" nor "prevented a judgment." In this case the original action has been determined and a final decree of divorce has been rendered, and of which—so far as the divorce itself is concerned—neither party complains. We therefore hold that the order is one which may be reviewed on error.

The next question presented is, whether or not the district court had authority under the statute to make the order complained of?

Section 12 of chapter 25 of the Compiled Statutes of 1885, provides that, "In every suit brought either for a divorce or for a separation the court may require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency; and it may decree costs against either party and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver."

By this it is apparent that "in every suit brought either for a divorce or for a separation" the court has plenary power, "in its discretion," to require the husband to pay a proper sum necessary to enable the wife to sustain her action or defense.

Section 27 of the same chapter is as follows: "After a decree for alimony or other allowance for the wife and children, or either of them, and also after a decree for the appointment of trustees to receive and hold any property for the use of the wife and children as before provided, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, and also respecting the appropriation and payment and income of the property so held in trust, and may make any decree respecting any of said matters which such court might have made in the original suit."

By this section the full power of the court over the matters therein specified is preserved the same as in the original suit. Looking alone to the petition of plaintiff in error, which seeks a modification of the decree only so far as it relates to the custody of the children, we might not find authority under the section above quoted for the order made by the district court, but the answer of defendant reaches back prior to the original decree, and calls it in question, charging that that part which settles the property rights of the parties was obtained by the fraudulent acts of

plaintiff in error, through his agent, and that, relying upon the false representations made to her, she consented to the decree without the interposition of a finding by the trial court. It is clear that this answer, if true, states sufficient to entitle her to relief. It is also clear that section 27 above quoted gives the court authority to grant that relief the same as it had in the original suit. This question was substantially passed upon in *Helden v. Helden*, 7 Wis., 256; 9 Id., 508; and 11 Id., 558; and it was there held that the court retained full power, not only to grant relief against the original decree, but that it had authority to give suit money to the wife during the pendency of the action to modify the decree. The court having the same power over the suit and the matters of alimony involved therein as it had over the original action, it follows that the order was properly made.

Defendant asks for an allowance to be paid by plaintiff to enable her to make her defense in this court. As the amount allowed by the district court seems to be sufficient, the motion will be overruled.

The order of the district court is affirmed, and the cause is remanded for further proceedings.

JUDGMENT ACCORDINGLY.

The other judges concur.

TOOTLE, HOSEA & Co., PLAINTIFFS IN ERROR, v.  
JONATHAN JONES, DEFENDANT IN ERROR.

1. **Justice of Peace: SETTING ASIDE JUDGMENT.** The order of a justice of the peace, or a county judge in the exercise of the same powers and jurisdiction, in setting aside a judgment rendered in the absence of a defendant, when made under the provisions of section 1001 of the civil code, should be made condition-

19	588
34	589
19	588
36	208
19	588
43	236
19	588
48	917
19	588
50	345
55	668



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Tootle, Hosea A Co. v. Jones.

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ally only in the first instance, and cannot be finally made unless the conditions of the section are complied with by the party seeking to open the judgment. If notice is not given to the plaintiff, as required, the application should be overruled and the original judgment be allowed to stand. The giving of the notice is jurisdictional.

2. ———: **APPEARANCE: WAIVER.** An application to set aside a judgment under the provisions of section 1001 of the civil code, is a recognition of the regularity of the judgment and a waiver of any objection that the judgment was prematurely rendered.
3. ———: **ERROR: REVIEW IN SUPREME COURT.** Where a judgment of a justice of the peace or county judge is taken on error to the district court and reversed, and the original case retained for trial in that court, such judgment of reversal is a final judgment and may be reviewed by the supreme court without waiting for the final disposition of the original case in the district court. *Banks v. UM*, 5 Neb., 240.

REESE, J.

On the 3d day of December, 1883, plaintiff instituted a suit in the county court, claiming judgment for \$65.70 and interest from March 1st, 1883. On the same day defendant appeared, waived issuance of summons, entered a general appearance, and obtained leave to answer in four days, and by agreement the trial was adjourned until January 7, 1884. The defendant failed to appear at the time fixed for trial, and judgment was rendered in favor of plaintiff. On the same day defendant filed a motion to open and set aside the judgment and confessed judgment for costs. The motion was sustained, the judgment set aside, and the time for trial fixed for one o'clock, P.M. of January 14. On that day defendant filed affidavit for continuance for service of notice, and the cause was continued until February 4th, when defendant appeared and the cause was continued until April 7. On the 7th day of April defendant appeared, and there was a finding and judgment in his favor for \$48 and costs. Plaintiff removed the cause to the district court, alleging error in all the proceedings after the entry of the

judgment in favor of the plaintiff on the 7th of January. The district court found error and reversed the judgment of the county court and retained the cause for trial. Plaintiff again alleges error in this court, assigning as such the action of the district court in retaining the cause for trial instead of allowing the judgment of January 7th to stand.

The question here presented is simply one of jurisdiction. If the county court had authority to set aside the judgment of January 7, and grant a new trial, but his proceedings were erroneous and irregular, the action of the district court is correct, as it is in accordance with the requirements of section 601 of the civil code. But if the county court exhausted its jurisdiction to render a judgment on the rendition of its first judgment, and its proceedings thereafter were void, the proceedings should have been set aside and the original judgment be allowed to stand. The authority of a justice of the peace, or county judge within that jurisdiction, to set aside a judgment rendered in the absence of a defendant is found in section 1001 of the civil code. This section is as follows:

“When judgment shall have been rendered against defendant in his absence, the same may be set aside upon the following conditions: *First.* That his motion be made within ten days after such judgment was entered. *Second.* That he pay or confess judgment for the costs awarded against him. *Third.* That he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment and of the time and place of trial at least five days before the time, if the party reside in the county, and if he be not a resident of the county by leaving a written notice thereof at the office of the justice ten days before the trial.”

By an examination of this section it will be seen that the order setting aside a judgment can be made only on three conditions. These are, the making of the motion

within the time prescribed, the payment of costs, or that judgment therefor be confessed, and that the party seeking to set it aside give written notice of the same and of the time of trial. These conditions are precedent. If the motion should be made after the expiration of the time in which the law provides it may be made, the justice could not molest the original judgment. If the defendant refused to pay or confess judgment for costs, he would have no power to act. The same is true if the notice be not given. The judgment can only be set aside conditionally in the first instance. Maxwell's Justice Practice, 76. If the judgment is thus conditionally set aside, and the notice is not given nor waived, that fact should be stated on the docket, without hearing any testimony, and the motion overruled. Swan's Treatise, 12th ed., 104. Applying these rules to this case, it is clear that the county court was without jurisdiction to set aside the judgment of January 7, as no notice was ever given, and his acts in that behalf were absolutely void. From the abstract it appears that the adjournments were allowed that defendant might give the required notice, but no notice was given, and finally an effort was made to set the judgment aside without it. Plaintiff seems to have had no knowledge of these proceedings, at least no appearance nor waiver of notice is shown.

It is claimed by defendant in error that the first judgment was erroneous, for the reason that it was rendered at the time set for trial, without waiting one hour, as required by law, before its rendition, and in this connection it is urged that as the record does not show to the contrary we must presume the judgment was set aside within the hour after the time set for trial, as it affirmatively appears that the action of the court in setting it aside was had on the same day on which the judgment was rendered. Neither one of these positions can be maintained, taking the abstract of the record as our guide. It is true that the effort to open the judgment was made on the same day on which

it was rendered, but it is shown that defendant appeared, "files motion to open and set aside judgment, and confesses judgment for costs," etc. Had defendant appeared within the time allowed by law for making his defense, it is very clear that he would not have confessed judgment for costs, nor would he have had the case continued from time to time in order that he might give the notice required by section 1001, *supra*. No such confession of judgment or notice would have been necessary. A simple demand to make his defense would have been all that would have been required. By his action he recognized the validity and regularity of the judgment, and he cannot now question it.

It is further contended by defendant in error that this cause should be dismissed, for the reason that the order complained of is not a judgment or final order subject to review, as the case is still pending in the district court upon its merits. That question was before this court in *Banks v. Uhl*, 5 Neb., 240, where it was held otherwise, and to which we adhere.

The judgment of the district court is reversed, and all the proceedings of the county court after the rendition of the judgment of January 7, 1884, set aside, and the judgment of that date in favor of plaintiff in error is reinstated.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. THE ATTORNEY  
GENERAL, V. L. C. BURR, AN ATTORNEY AT LAW.

1. **Attorney: UNLAWFUL CONDUCT: INFORMATION.** Where it is alleged in an information filed against an attorney at law for the purpose of his removal from office, that a person was convicted of the crime of murder in the first degree and sentenced to be hanged, which conviction and sentence was affirmed by the supreme court, and pending a proceeding in error to the supreme court of the United States the convict was confined in the jail of a county, other than the county in which the conviction occurred, for safe keeping, which allegation is admitted by the answer of respondent, this will be sufficient, under the law of this state, without further proof, to show that the imprisonment was legal, and that a release of the person convicted and so imprisoned would be wrongful and in violation of law.
2. ———: **EVIDENCE.** Testimony examined, and *Held*, To support a finding of fact.
3. **U. S. Commissioner: HABEAS CORPUS.** A United States commissioner appointed by the circuit court of the United States has no authority to issue a writ of *habeas corpus* and discharge from the custody of a sheriff a person who has been convicted of a felony by the courts of the state. The issuance of such writ and the discharge of such prisoner thereunder would be void, and in effect an escape of the prisoner. An attorney having charge of a cause through the district and supreme courts of the state and in the supreme court of the United States cannot be heard to insist that in procuring the issuance of such writ and the release of such convict he acted in good faith, believing at the time that such proceeding was in accordance with law.
4. **Attorney: CONSTRUCTION OF STATUTE.** Section 5 of chapter 7, Compiled Statutes of 1885, does not control the action of an attorney in conducting "the defense of a person charged with a public offense," but this is limited to such defense in a court upon the trial of the case on its merits, or in a collateral or interlocutory proceeding. It does not permit the use of illegal or fraudulent means to secure the release or escape of a person convicted of crime.
5. ———: **REVOCATION OF LICENSE TO PRACTICE.** The supreme court, having power by express statute to grant a license to

practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated in the grant. *People v. Goodrich*, 79 Ills., 148.

6. ———: DUTY OF ATTORNEY. In granting a license to practice law it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner, and abstain from such practices as cannot fail to bring discredit upon himself, the profession, and the courts. *Id.*
7. ———: DECEIT. If a deceit is practiced by an attorney in his character as such, although not in a suit pending in the court, he may be removed from his office as attorney. The effect of such removal is to deprive the attorney of the right to practice as such in all the courts of record of the state. *Vide In the matter of Peterson*, 3d Paige's Chancery Rep., 510.
8. ———: REMOVAL FROM OFFICE: CASE STATED. Where an attorney was employed to defend a prisoner charged with murder in the first degree, and upon trial the prisoner was convicted of the crime charged, and sentenced to be hanged, and upon a removal of the cause by proceedings in error to the supreme court by such attorney, the judgment was affirmed, and upon the application of the same attorney, on behalf of the prisoner, the supreme court of the United States granted a writ of error, staying execution of sentence until after decision, and while such cause was pending in the supreme court of the United States the attorney, without warrant or authority of law, procures a United States commissioner to issue a pretended writ of *habeas corpus* and discharge the prisoner on bail, and the prisoner is thus allowed and caused to escape, such conduct was held to be a violation of the official duties of an attorney, and that he should be removed from office therefor.

ORIGINAL information by the attorney general, alleging unofficial conduct of respondent as an attorney at law.

*William Leese, Attorney General*, for the information.

*J. M. Woolworth*, for respondent, cited: *Ex parte Burr*, 9 Wheaton, 530. *Ex parte Garland*, 4 Wall., 378. *Ex parte Robinson*, 19 Wall., 512. *Dickinson v. Dustin*, 21 Mich., 561. *People v. Harvey*, 41 Ill., 277. *Ex parte Tillinghast*, 4 Peters, 108.

REESE, J.

On the 30th day of September, 1885, the attorney general, acting in the line of his duty, presented an information to this court alleging, among other things, that on the 26th day of October, 1883, one Matthias Simmerman was convicted of murder in the first degree by the district court of Kearney county and sentence of death was pronounced against him; that afterwards such proceedings were had as brought the cause into the supreme court for review upon error, where the judgment and sentence of the district court were affirmed, and the 17th day of April, 1885, was fixed upon as the time for the execution of the sentence; that on the third day of March, 1885, a writ of error was allowed by one of the associate justices of the supreme court of the United States, which writ was issued out of said court, commanding this court to stay proceedings until the cause could be heard and decided by that court, and that said cause was still pending therein. That said Simmerman was, by order of the court, removed to the county jail of Buffalo county for safe keeping; that respondent is now and for some time last past has been a practicing attorney of this court, and as such attorney has had sole control of said cause on behalf of said Simmerman, and while said cause was still pending in the supreme court of the United States the said respondent, on the 25th day of September, 1885, in the county of Buffalo, in this state, did falsely, willfully, and knowingly represent to one Marsh Saville, a United States commissioner at Kearney, in said county, that, as such commissioner, the said Saville had jurisdiction to release said Simmerman on bail, and for that purpose had power and authority to issue a writ of *habeas corpus* to the sheriff in whose custody said Simmerman was detained, and cause said Simmerman to be brought before him for said purpose of admitting him to bail; that said

Saville, as such commissioner, acting on the false advice of respondent as such attorney at law, on said day issued a writ of *habeas corpus* in favor of said Simmerman to the sheriff of Buffalo county, commanding him to produce the body of said Simmerman forthwith before the said Saville, which said writ was served by a deputy marshal of the United States, and on the same day, in obedience to said writ, the said sheriff delivered said Simmerman before said commissioner, who, acting under the sole advice and counsel of respondent, discharged said Simmerman from the custody of the sheriff and from the authorities of the state; that no notice of any kind of said proceeding was served upon the attorney general, nor any other person, to appear in behalf of the state, but that the whole proceeding was clandestine and executed in secrecy by respondent, and was a trick and device contrived by respondent as such attorney at law, and with intent to deceive and to obstruct the due course of justice and of the legitimate authority of the state; that at the time respondent so procured said writ to issue and said Simmerman to be discharged from custody, he well knew the same to be contrary to law and the advice to be false. The prayer of the information was that the matter be referred to a committee of the bar for investigation, and in order that such steps might be taken as should be deemed necessary, etc. But the court was of the opinion that sufficient was contained in the information filed by the attorney general, and that it was his official duty to conduct the examination, in order that the inquiry might be thoroughly and properly made.

By the direction and order of the court notice was served upon respondent, and he appeared and filed an answer to the charges, admitting the proceedings before the United States commissioner as alleged in the information, but denying all allegations touching bad faith or false advice on his part, and alleging that all steps taken by him in the matter of the release of Simmerman were taken in good



faith, without collusion, fraud, deceit, evil design, or secrecy, and with no impure or dishonest motives on his part.

The matter was referred to a committee of attorneys of the court, consisting of John C. Cowen, of Douglas county, chairman; M. L. Hayward, of Otoe county; John M. Ragan, of Adams county; A. Ewing, of Merrick county; and N. S. Harwood, of Lancaster county; with directions to hear the testimony and to find and report their conclusions of fact and of law.

In obedience to this order the committee met, and were about to proceed to the taking of the testimony, when an objection to the taking of testimony was made, upon the ground that the court had no jurisdiction to make the inquiry, which objection was preserved by the record, and the testimony of Saville taken, when it was stipulated that the case should be submitted upon this testimony, the pleadings in the case, and the copy of the writ of *habeas corpus*.

The finding of the committee was as follows:

\* \* "The committee find that it is admitted by the pleadings that on the 26th day of October, 1883, said Mathias Simmerman was convicted in the district court of Kearney county, Nebraska, for the crime of murder in the first degree, and sentenced to be hanged; that the case was brought into this court, and all the proceedings confirmed, on the 18th of November, 1884, and said Simmerman was on said date, by the court, sentenced to be hanged on the 17th day of April, 1885; that on March 3d, 1885, a writ of error was issued out of the supreme court of the United States, staying all the proceedings in said case; that on the 25th day of September, 1885, such case was pending in the supreme court of the United States; that at that time said Simmerman was and for some time before had been confined in the county jail of Buffalo county, Nebraska, by order of this court, under sentence of death; that at said time, and for many years before, the said re-

spondent L. C. Burr was an attorney of this court, and the attorney for said Simmerman in all said proceedings.

"It is also admitted by respondent's answer that on the 25th day of September, 1885, the respondent L. C. Burr appeared as attorney for the said Matt. Simmerman before one Marsh Saville, then acting as United States commissioner of the district court of the United States for the state of Nebraska, and then and there, as such attorney, filed with said Saville the petition of said Matt. Simmerman for a writ of *habeas corpus*, with a view of having said Simmerman brought from said jail before said Saville, and by him admitted to bail; that thereupon said Saville issued said writ, directed to the sheriff of Buffalo county, commanding him to bring the body of said Simmerman before said Saville, which writ was served by A. G. Hastings, a deputy United States marshal for the district of Nebraska; that said marshal and said sheriff produced said Simmerman before said Saville, in obedience to said writ, and the said sheriff thereupon made return of the cause of the capture and retention of said Matt. Simmerman, and that said Saville then and there released said Simmerman upon bail.

"We further find from the testimony that such proceedings did not take place at the office of said Saville, but at a hotel in Kearney. The writ was issued about six o'clock, served about eight o'clock, and Simmerman released about nine o'clock of the evening of the 25th of September, 1885; that said L. C. Burr persuaded said Saville into the belief that, as such commissioner, he had jurisdiction and authority to release said Simmerman on bail, and that it was his duty to do so, and induced said Saville to issue said writ of *habeas corpus* and release the said prisoner Simmerman, on a bail bond of \$10,000, signed by a citizen of Wyoming territory, but whose name is not given in the testimony.

"No notice of any kind of the foregoing proceedings was given to the state authorities.

"The committee further reports as its conclusions of

law, that said Simmerman was legally confined in the jail of Buffalo county in the custody of the sheriff of that county; that he was not entitled to bail; that said Saville had no authority to issue said writ and release the prisoner, and had no jurisdiction to take any action whatever in the premises; that the whole of the proceedings to secure the release of the prisoner Simmerman at Kearney were without any authority or precedent whatever, and were in flagrant violation of law and the judgment of this court in the case.

"It is also our conclusion of law that the professional or other conduct and acts of an attorney at law—an officer of this court, admitted to practice under its rules—as affecting the trust and confidence reposed in him as such attorney, and his relations to the court by virtue of his license, are within the jurisdiction of this court to take such action with respect thereto as the facts may warrant."

This report is signed by all the members of the committee.

Upon the filing of the report, respondent filed certain exceptions thereto, as follows:

"This defendant excepts to the finding in said report 'that at that time (that is to say, on the 25th of September, 1885), said Simmerman was, and for some time before had been confined in the county jail of Buffalo county, Nebraska, by order of this court (that is to say, the supreme court of the state of Nebraska), under sentence of death,' whereas the said committee in and by its said report, should have found that said Simmerman had been prior to January 1st, 1885, by order of the district court of Kearney, removed to the county jail of Buffalo county for safe keeping, but it did not by the pleadings or proofs in this matter appear where or upon what authority he was on said day confined, and for aught that appeared in and by said proceedings he was illegally restrained of his liberty."

"Second. This defendant excepts to the finding in said

report, 'that said Simmerman was legally confined in the jail of Buffalo county,' whereas the said committee in and by said report should have found that in and by the pleadings, proofs, and proceedings in this matter it did not appear by what, if any, authority the said Simmerman was confined, and for the purposes of the inquiry submitted to said committee it must be taken and held that he was illegally confined and restrained of his liberty without due process of law."

"Third. This defendant excepts to the finding in said report, that he 'persuaded said Saville into the belief that as such commissioner he had jurisdiction and authority to release said Simmerman on bail, and that it was his duty so to do, and induced said Saville to issue said writ of *habeas corpus*,' whereas the said committee in and by its said report should have found that this defendant duly, fairly, honestly, and in the course of his duty as an attorney and counselor at law, presented to said Saville the facts and law of the case and addressed to them only such arguments as he was justified in doing."

"Fourth. This defendant excepts to the said report because the said committee fail and neglect in and by their said report to find that this defendant did in good faith and without falsehood, in the discharge of his duty as an attorney for said Mathias Simmerman, make out and file a petition for a writ of *habeas corpus* with said Saville; that an open, public hearing was had of said cause and *habeas corpus*, and the same proceedings therein were, on the part of this defendant, had and taken and prosecuted in good faith, without fraud or collusion, deceit, guilt, artifice, circumvention, or collusion; that no disrespect of this court or its judgments or decrees was intended or designed, but he acted in good faith, with pure and honest motives, and with no evil design and without deceit or collusion."

"Fifth. The said defendant excepts to the finding of the said report, 'that the professional or other conduct and

acts of an attorney at law as affecting the trusts and confidence reposed in him as such attorney, and his relations to the court by virtue of his license, are within the jurisdiction of the court,' whereas the said committee in and by its said report should have found that this court has no jurisdiction to inquire of or in respect to the matters and things by the attorney general complained of in the information filed herein."

These exceptions, in connection with the whole case, were submitted upon elaborate arguments, both printed and oral, by the very able counsel representing respondent, and will be noticed by us substantially in the order in which they were presented.

The first exception is in part, though upon an immaterial matter, well taken; that is, as to the finding that Simmerman was confined in the jail of Buffalo county by order of this court. The information alleges that "the said Simmerman was by order of the court removed to the county jail of Buffalo county for safe keeping." There is no allegation that such removal was by order of this court. This allegation is admitted by the answer of respondent and should have been so found by the committee or referees. It is quite probable the mistake was made by the person who copied the report with the type writer, and the error was overlooked by the committee before signing. To this extent the report will be modified and corrected by changing the word "this" to "the," according to the allegation and admission of the pleadings, since no order has been made by this court as to the place of confinement of Simmerman. But in our view of the case this matter is wholly an immaterial one, as it is alleged and admitted that said Simmerman was confined in the jail of Buffalo county "for safe keeping" during the pendency of the cause in the courts of review. If he was confined there for that purpose and by that authority, the confinement was legal. It is alleged and admitted throughout that Simmerman

was so confined in the county jail of Buffalo county. The petition for the writ of *habeas corpus* prepared by respondent and admitted in evidence alleges the conviction and the confinement thereunder, but that the confinement is illegal because the said several judgments (of the district and supreme courts) are void because they deprived Simmerman "of the right to resist an unlawful attempt to arrest" said Simmerman, the killing having been done while the deceased was attempting to arrest him without a warrant. There is amply sufficient in the pleadings and evidence to show that Simmerman was held in the county jail of Buffalo county under this conviction for safe keeping. Section 377 of the criminal code provides that, "whenever it shall be lawful and necessary to confine any person in custody previous to a conviction upon a criminal accusation, or in custody for contempt or alleged contempt of court, or upon an attachment by order of a court or judge, or otherwise in lawful custody or upon conviction for any offense, and there shall be no secure jail in the proper county, the officer or person having him in such custody may convey him to and confine him in the jail of any county in the state, or other secure and convenient place of confinement in the state, to be procured by such officer or person having such prisoner in custody."

By this, in connection with the pleadings and evidence, it appears that Simmerman was legally confined in the county jail of Buffalo county as he was confined by *virtue of the judgment of conviction*. Neither can it avail respondent anything that Simmerman was confined in Buffalo county in the custody of the sheriff of that county, as in this, while holding him under the judgment of conviction, he was acting officially, and the imprisonment in this sense also was lawful. *Martin v. Seeley*, 15 Neb., 136. The foregoing substantially disposes of the second exception, and no further attention need be given to it.

The next exception is the third, which is to that part of the

## State v. Burr.

report which finds that respondent "persuaded said Saville into the belief that as such commissioner he had jurisdiction and authority to release said Simmerman on bail, and that it was his duty so to do, and induced said Saville to issue the writ of *habeas corpus*," etc. The testimony of Saville was taken and accompanies the report. By this testimony it appears that the witness had a conversation with respondent prior to the issuance of the writ. He says: "The conditions were these plain, simple, naked statements, and that was this: I said, 'If you can show me that the United States commissioner has the power, and it is his duty to release a person that has been first under the state court and his case has been appealed to the United States supreme court, if you can show me that the federal authorities have control of the prisoner instead of the state authorities, and that I have the right to release him under bail, and you will furnish me with good and sufficient bond, I'll do it.'" Again, in another part of the testimony, he says: "I never met Mr. Burr in my life until the night of the release of Mr. Simmerman on bail; that's the first time I ever saw him. Then I spoke to him in regard to two things. One was my right to do this and my duty to do it, and the second was the sufficiency of the bail. Mr. Burr says that he is satisfied that I had the jurisdiction and it was my duty to do it, and I thought so too, and I am inclined to think so yet," etc. Again, this question was asked him: "How long was Mr. Burr there before the writ was issued, in Kearney?"

A. He came up on the B. & M. train about eight o'clock, I think. I had a talk with him about an hour.

Q. Did you talk about the jurisdiction of the commissioner?

A. Why certainly; that was the only thing; that and the sufficiency of the bond were the only two things I cared anything about.

\* \* \* \* \*

Q. Now, what did Mr. Burr say in regard to a penalty?

A. He said it was my duty to do this, to get the order of the writ of *habeas corpus*. The whole question to me was this fact: Whether the federal court has jurisdiction and right of custody of the prisoner. It's what the whole question was on.

Q. I was going to ask you to state what was said in regard to a penalty by Mr. Burr?

A. Well, the thing was this: that he told me—I can't tell it in words as he told it—but he said it was my duty as United States commissioner to have custody in this case.

Q. Mr. Burr told you that?

A. Yes, that it was my duty.

It is very apparent from the testimony of the witness that his knowledge of the law was somewhat limited. That he questioned his right to take the step suggested, and that he relied upon respondent for information as to his duty. It is also very clear, as this testimony is uncontradicted, that respondent not only told him that he had authority to issue the writ and admit Simmerman to bail, but that it was his duty to do so.

In the further consideration of this exception we will consider with it the fourth, which reaches to the honesty of purpose and good faith of respondent in procuring the discharge of the prisoner in the manner in which it was done. It was conceded on the argument that no authority existed in Saville to issue the writ, and hence, clearly, it was not his duty to issue it. Indeed, such concession could not be avoided, for the law nowhere, by hint, intimation, or suggestion, would in any degree present to the mind of a reader, whether learned in the law or not, any such an idea. His duties are defined by law, and no construction of the language could be given which would lead a legal mind, or any mind for that matter, to believe such power existed.

It would be an insult to the intelligence of respondent, and to his sagacity as a lawyer, to say that he believed that



such power existed. His reputation at the bar would, of itself, repel such an idea. As well might one apply to a justice of the peace for such a process. In one sense the respondent (for whom the writer has always entertained the highest respect) was doubtless acting in good faith, and that was, he felt the great responsibility resting upon him of protecting the life of a fellow being whom he had been defending. Feeling this responsibility he did not stop to enquire as to methods. Not that he was then engaged in his defense, for he was not, but having suffered defeat, he sought to avert the doom which seemed to be impending over his client. But this condition of things could in no sense justify the measures adopted and the course pursued. So far as good faith in a legal and legitimate sense is concerned, as well might he have opened the jail door and told the condemned man to flee for his life.

It is said by the learned attorney who has so ably conducted the defense of respondent that "this case involves a great principle of professional ethics," referring to the duties and rights of an attorney in conducting the defense of a person charged with crime, and the brief before me shows careful and labored research upon this question. Statutes and opinions of distinguished men, extending back some three hundred years, are cited and quoted for the purpose of giving force to the provisions of the second clause of section 5 of chapter 7 of the Compiled Statutes of 1885. This clause, in connection with the first line of the section, is as follows: "It is the duty of an attorney and counselor

\* \* \* to counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense." It is insisted that this section makes the attorney sole judge as to the propriety of his methods, and that he is to answer to no one save to his own conscience as to the rectitude of his actions; and that to hold him otherwise responsible would be not only an injury to him,

but a greater one to the profession which he represents. We take the liberty to transcribe from respondent's brief a cogent statement of the views of his counsel upon this point. He says: "I do not say that the lawyer using improper means for the defense or escape of his client shall not and ought not to be punished; he certainly will be punished. Instructed as no other man is in what is right and just, the lawyer who resorts to vicious methods will meet a retribution just as certain as the rising of the sun and the going down of the same. Within himself is a judgment seat, and before it he must stand to answer for his sin, and he can never escape the judgment; but when you call him before another court to answer for his misdeed, without showing corrupt purpose and intentional wrong, you do a greater injury than letting this guilty man escape. You punish with infinitely greater severity the profession he has disgraced and the society he has outraged."

The only difficulty with the views here presented and those presented by quotations from the declarations of learned men and the statute above quoted, is their want of applicability to the case at bar. Were these principles invoked in behalf of one who had transcended the bounds of propriety and right in "the *defense* of a person charged with a public offense," they would be applicable here, and would decide the case in favor of respondent without question. But what is meant by the words above quoted? Simply that while defending such a case the lawyer must to a great extent be the judge of the manner in which he will make the desired defense. Would he be justified in extorting from a court or jury by force or intimidation the desired ruling or verdict? Certainly not. Would he be justified in rescuing his client by force and violence from the officer in whose custody he might find him? As clearly not. His conscience must be his guide as to the "defense" he will make. Beyond this it will not do to go. The

place and time to make a "defense" is in a court of justice, provided by law for hearing and determining a cause, or some branch of it, and at the time appointed for such hearing. Could it be contended for a moment that the procuring of a justice of the peace to issue a writ of *habeas corpus* for the release of a condemned and convicted felon would be a proceeding in the "defense of a person charged with a public offense," and there be no accountability to the courts of the lawyer who would thus procure the release of such a criminal? No higher justification can be found in the fact that another officer was found, with as little authority, who would issue the writ. The "defense" of a person charged with crime is one thing. The procuring of an escape of a criminal already convicted is quite another.

A question propounded on the hearing of this cause was as to the nature of this prosecution—whether against respondent for contempt of court, or whether against his standing at the bar of the courts of the state for the purpose of disbarring him, if his conduct was found to merit such a punishment? Clearly, the latter. No attachment has issued, nor has an order to show cause why one should not issue been made. Respondent has not been arrested, and he is in no sense within the jurisdiction of the court so far as the infliction of any fine or imprisonment is concerned.

The next and last question presented is as to the jurisdiction of the court to take cognizance of the professional conduct of one of its officers. Under the facts and circumstances of this case it seems that that jurisdiction cannot be successfully questioned. While it is true that an attorney is accountable directly to the court whose dignity he has insulted or whose process he has resisted, yet we think it equally true if a deceit or other wrong is practiced by an attorney in his character as such, although not in a proceeding or suit pending in the court, yet he may be removed

or suspended by any court of which he was a member. This was the ruling in the matter of the removal of Peterson, 3 Paige's Ch. Rep., 510. In that case the chancellor, in delivering the opinion of the court, says: "Solicitors, attorneys, and counselors are admitted to practice and are entitled to special privileges under the laws of the state, for the purpose of enabling them to be useful to their fellow citizens in the ascertainment, prosecution, and defense of their legal and equitable rights; and if such officers abuse the trust which has been thus reposed in them, \* \* it is the duty of the courts in which they practice to remove them from their office, as well for the protection of the public as to preserve the character of an honorable and useful profession."

In *The People v. Goodrich*, 79 Ill., 148, it was held that the supreme court having power by express statute to grant a license to practice law, has an inherent right to see that the license is not abused or perverted to a use not contemplated by the grant. And in granting such license it is on the implied understanding that the party receiving it shall in all things demean himself in a proper manner and abstain from such practices as will bring discredit upon himself and the courts. Other cases might be cited, but it is not deemed necessary to do so. To deny a court the right to call its attorneys to account for any professional act committed by them which is derogatory to their profession and brings disgrace upon it, or upon the courts, would be to remove one of the strongest safeguards, erected by law and long established usages, to the profession of the law, to the courts, and to the people.

From a careful consideration of the report of the committee, the evidence, and the law, the court finds that the charges preferred are fully sustained. It is therefore ordered by the court that the respondent L. C. Burr be removed from his office as an attorney of this court; the legal effect of which removal will be to deprive him of the

Ballard v. State.

power to practice as an attorney in any other court of record of this state, but that at the end of two years from this date he may apply for reinstatement if he so desires. A copy of the order removing him must be sent by the clerk of this court to each of the judges of the district courts of this state.

JUDGMENT ACCORDINGLY.

MAXWELL, CH. J., concurred.

COBB, J., dissented.

**THOMAS BALLARD, PLAINTIFF IN ERROR, V. THE STATE  
OF NEBRASKA, DEFENDANT IN ERROR.**

**1. Trial: EXCLUDING EVIDENCE: ERROR WITHOUT PREJUDICE.**

Where an objection to a question is sustained and the testimony excluded, if the witness is afterwards recalled and fully examined upon the matters presented by the former interrogatories the ruling of the court in sustaining the objection, even if erroneous, will not be sufficient cause for reversing a judgment unless it should affirmatively appear that the prisoner was prejudiced thereby.

**2. Witnesses: EXPERTS.** Hypothetical questions to experts must be framed so as to fairly reflect facts either admitted or proved by other witnesses and must not assume as proven that which has not been, nor should they be based upon conclusions of fact which can only be found by a jury.

**3. Criminal Law: TRIAL: WITNESSES FOR THE STATE.** In the trial of a criminal prosecution wherein a defendant is arraigned upon an indictment found by a grand jury, the state is not precluded from the examination of witnesses whose names are not endorsed upon the indictment.

**4. Evidence: STATEMENTS OF PRISONER.** It is not error to allow an officer who arrested a defendant to testify as to statements made by such defendant while in custody, if it be shown that such statements were made voluntarily and without any induce-

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25	532
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39	728
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ments—of hope or fear—being made or offered by such officer or other person.

5. **Instructions: CLERICAL MISTAKE OF CLERK IN COPYING.** A clerical mistake of the clerk of a trial court in copying an instruction into the transcript will not be sufficient cause for reversing a judgment if it affirmatively appears by the phrascology of the instruction what its original language was, and that such instruction, being upon an immaterial matter, could work no prejudice to the party on trial even if correctly copied.
6. ———. The charge of the court to a trial jury should be a clear and explicit statement of the law applicable to the facts in the case.
7. **Criminal Law: INSANITY AS A DEFENSE.** Where in a criminal case the accused relies upon insanity as a defense, and there is testimony tending to prove such insanity, the burden of proof is on the prosecution to show sanity. *Wright v. The People*, 4 Neb., 407.
8. **Instructions to Jury.** If one of the paragraphs in the charge of the court to the jury misstates the law upon a material point, such error will not be cured by another paragraph which states the law correctly, because the jury would be left in doubt as to which paragraph was correct. *Wasson v. Palmer*, 13 Neb., 376.
9. ———. Instructions to a jury must be based upon the evidence adduced on the trial.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

*O'Brien & O'Brien* and *Charles P. Burkett* (with whom were *Scott & Scott*), for plaintiff in error.

*William Leese*, Attorney General, and *Lee S. Estelle*, District Attorney, for the State.

REESE, J.

Plaintiff was convicted of murder in the first degree and sentenced to be hanged. He alleges error in this court, and, under the provisions of the constitution of the state, the execution of the sentence is suspended by act of law until the case is reviewed by the supreme court.

Before entering upon the discussion of the questions presented by this record we deem it proper to say that the brief of counsel for plaintiff in error contains an unwarranted and unjust attack upon the learned and impartial judge who presided at the trial in the district court. We have examined the record carefully from the beginning to the end for some evidence of the bias and prejudice against the prisoner so often and persistently imputed to the trial judge, and can find no trace whatever of any proof of such feeling or action on his part. So far as the record discloses, it is absolutely wanting. Such statements and insinuations, unless founded upon the record, can be of no possible benefit to a cause, and no excuse can be found for their use. It often happens that in the hurry and excitement of a trial in which great interest is taken, and where little, if any, time can be taken for reflection and investigation by the judge, where decisions must be made upon a moment's notice, erroneous rulings may be made by which the party on trial is prejudiced. Such has been the history of courts ever since their establishment. The most profound judges have erred, but such errors are not imputed to them as any evidence of a want of impartiality or of the existence of bias. It is true that there are occasional exceptions to the rule, but they are rare, and evidence of the fact can usually be found in the records made. While errors may be found in this case prejudicial to plaintiff in error, yet none of them suggest the existence of anything upon the part of the trial judge but a desire to give to plaintiff in error a fair and impartial trial. Indeed, it affirmatively appears that all reasonable efforts were made in that direction, and the unusual incident is shown to have occurred of the court adjourning at an early hour in order that the attorneys conducting the defense might take time to prepare proper questions to propound to a witness, a thing they were unable to do while the trial progressed.

The testimony adduced on the part of the state leaves no doubt of the fact of the killing by the accused. It was testified to clearly and unequivocally by a number of witnesses, and not denied or disputed by any witness on the part of the defense. The defense interposed was that of insanity. This insanity, it is claimed, was produced by the long continued use of intoxicating liquors, and a condition of intoxication at the time of the killing. The form of insanity known as dipsomania was principally relied on. The testimony shows that plaintiff in error had, for a number of years, been addicted to the use of intoxicating liquors, which resulted occasionally in prolonged "sprees" of drunkenness. But these debauches were not of very frequent occurrence; many months sometimes intervening between them. During most of the time—nearly all—he was able to transact ordinary business, and just prior to the killing was employed as night clerk and "runner" for the St. James Hotel in the city of Omaha, a part of his duties being to be at the railroad depots on the arrival of trains and solicit customers for the hotel; and at times attending bar in a saloon maintained in the hotel with which he was connected. The deceased, Henry Verpoorten, was also employed in the same hotel, and the day before the commission of the homicide plaintiff in error was discharged and Verpoorten retained. On that day, which was Sunday, plaintiff in error showed indications of being somewhat under the influence of liquor, as some of the witnesses thought, and late in the afternoon went into the saloon where Verpoorten was employed and shot him, Verpoorten dying instantly. As a new trial must be had, it is not deemed proper to discuss the testimony or express any opinion upon the facts not conceded.

After the testimony for the state had been introduced a number of witnesses were examined who testified to their acquaintance with plaintiff in error, his habits of excessive drinking, intoxication, etc. Dr. Spaulding was called and



examined as to insanity resulting from drunkenness, and as to the form of insanity known as dipsomania.

For the purpose of presenting one of the alleged errors relied on by plaintiff in error, and one which may arise upon a subsequent trial, I here quote from the record certain questions, objections, and the rulings of the court:

"Q. When a man has been irresistibly in the habit of drinking intoxicating liquors periodically, to excess, and has contracted an irresistible desire for its use—when under the influence of liquor—what, in your opinion, would be his condition as to being sane or insane?

"Objected to as incompetent. Sustained. Defendant excepts.

"Q. When a man has been irresistibly in the habit of using intoxicating liquors for seventeen years more or less to excess, at intervals, say, from a week to six weeks apart, being drunk for two weeks and sober for a period between that and his next debauch, state whether such a man would be considered, during the time of his intoxication, as free from the disease known as dipsomania?

"Objected to as immaterial. Sustained. Defendant excepts.

"Q. When a man has used intoxicating liquors for a period of ten years to excess, during from five to seven days at a time, then an interval of from four weeks to three months intervening between that and the next time when he used intoxicating liquor to excess, and so continued irresistibly to use it for from five to eight days, and so continued in that intermittent way to use liquor, being sober at times and drunk at others for ten years, what is your opinion as to his being entirely free from any disease known under the head of any of the general subdivisions of insanity while laboring under the influence of intoxicating liquor at any one of these times?

"Objected to as incompetent—sustained. Defendant excepts."

The court here adjourned until the next day to allow counsel to "frame an hypothetical question," which was done, and the witness examined thereon during the course of the trial. As the witness was fully examined during the subsequent stages of the trial, whatever error might have been committed by the ruling of the court in sustaining the objections was effectually cured, and there would be no ground for complaint. But was the ruling erroneous?

The definition of dipsomania given by this witness, and which is no doubt correct, is as follows: "Dipsomania is an irresistible impulse to indulge in intoxication, either alcohol or other drugs—opiums." This mania or disease is classed as one of the minor forms of insanity. Applying this definition to the first of the above interrogatories the question might be stated thus:

"If a man has been suffering from dipsomania, and has contracted dipsomania, what in your opinion would be his condition as to being sane or insane?" The same observations are applicable to the second question, except that it is more obnoxious to the objection than the first, as the question is asked directly whether such a person would be "free from the disease known as dipsomania?" The third is substantially the same except that the time referred to is "while laboring under the influence of intoxicating liquor." There seemed to be an "irresistible" impulse operating on the mind of counsel to include the word "irresistible" in all his forms of interrogatory, and this, too, without any proof of the irresistible desire for intoxicating liquors on the part of plaintiff in error. It is true the testimony shows repeated intoxications for a number of years, but there is nothing which negatives the idea of these "sprees," as they are termed by the witnesses, being entirely voluntary. In fact, the power to refrain from the use of intoxicants for a considerable time is clearly shown. He became intoxicated as hundreds of other men with depraved appetites and passions do, but, so far as the testimony goes, it

was his pleasure to do so. The ruling of the court was clearly correct.

Objection was made to the examination of certain witnesses produced by the state, for the reason that their names were not endorsed on the back of the indictment. The objection was properly overruled. We know of no provision of the statute which was violated thereby.

Thomas Perionett, the officer who arrested plaintiff in error soon after the homicide, was a witness on the part of the state. He testified to certain statements made by plaintiff in error to himself and others after the arrest. This testimony was objected to as incompetent. We are not informed anywhere in the printed argument of counsel for plaintiff in error as to the specific ground for this objection, but suppose it is based upon the fact that the witness was an officer having the prisoner in custody at the time the statements were made. In such case it is well settled that the statements or confessions of a prisoner to one in whose custody he may be, must be shown to be voluntary and without inducements held out by the officer, either of fear or hope, before they can be admitted in evidence. But in this case these conditions were fully shown. The officer testified not only that he had not offered any inducements, but that he cautioned the prisoner not to talk to him, and advised him not to talk about the matter to any one. The testimony was admissible.

It is alleged that the court erred in giving certain instructions to the jury, which we will next notice.

The first instruction complained of is the seventh of those given by the court upon its own motion. It is as follows:

"Murder in the first degree is defined by our statute, which I have given you in my second instruction, and the definition there given by our law-making power is so plain and concise that I feel confusion in attempting a further definition than a short repetition.

"Should you find that Henry M. Verpoorten was alive in Douglas county on the fifteenth day of March, 1885; that said Verpoorten is now dead; that he died from an injury from the hands of some one other than himself; that he came to his death by a wound in the left side inflicted by a bullet discharged from a pistol; that the defendant discharged the pistol; that the defendant discharged the pistol and inflicted the wound of which said Verpoorten died—if you are satisfied of the truth of all the above stated facts beyond a reasonable doubt, then it becomes your duty from the evidence to hunt for a motive and design on the part of the defendant, and if you find from the evidence, beyond a reasonable doubt, that the defendant purposely, and with deliberation and premeditation, and with malice deliberate and premeditated, did the killing, then you should find defendant guilty of murder in the first degree."

The first criticism which is made upon this instruction is as to the use of the word "feel," near the close of the first paragraph. It is said, and no doubt truthfully, that the instruction as originally written and read to the jury contained the word "fear" instead of "feel," but that by the mistake or carelessness, or otherwise, of some copyist since the trial the word has been changed from "fear" to "feel." That the learned judge told the jury that the crime of murder in the first degree was so plainly defined in the statute that he feared confusion should he attempt a more particular definition. An inspection of the language for a moment would impress one that such is the case. Clerks of courts should exercise particular care to see that the records of trials, including instructions, are correctly copied when making transcripts. It is of vital importance that such mistakes should not occur. While this mistake might not and would not work a reversal of the judgment, yet no latitude in such matters should be allowed by clerks. It is their duty to see that no mistakes are made.

The objection to the last paragraph of the instruction is to that clause which informs the jury that if they find that plaintiff in error killed Verpoorten in the manner described, it then became their duty "from the evidence to hunt for a motive and design on the part of the defendant," etc. It must be conceded that this part of the instruction is not so clear in its meaning as might be desired. From what immediately follows it was evidently the intention of the court to instruct the jury that if they found that plaintiff in error killed the deceased in the manner stated, then they should inquire whether such killing was done "purposely and of deliberate and premeditated malice," as required by section 3 of the criminal code. "The charge of the court should be a clear and explicit statement of the law applicable to the facts in the case." *Milton v. The State*, 6 Neb., 136. The instruction before us can not be said to comply with these requirements. It might be said that the instruction would not be prejudicial, as it might be construed to favor plaintiff in error by requiring them to find a motive when none was shown to exist and none necessary to have been proven.

The next instruction which it is deemed necessary to notice is the thirteenth. It is as follows: "You are instructed that if you are satisfied from the evidence that the defendant was, at the time of the killing, insane, aside from being under the influence of liquor, then you should acquit the defendant of all three of the grades of criminal homicide and turn him loose. If he was at the time insane he cannot be convicted of any offense whatever."

It is argued with considerable degree of earnestness that the phrase "and turn him loose," as found in the instruction, while not so intended, was a reminder to the jury that if plaintiff in error was acquitted by them he would be turned loose upon society, and be thus permitted to kill others as he had the deceased. And not only so, but that the jury by returning such a verdict would be held, to

some extent, responsible for the offenses which he might commit or the injury which he might do. It is true, as argued by counsel at the bar, that it is not the province of a trial jury to turn any person loose; that they simply pass upon the guilt or innocence of the person on trial, and that it is not the duty of the courts and their officers to decide whether or not a prisoner shall be discharged. Yet it is also true that a verdict of not guilty would necessarily result in the discharge of a prisoner, so far as that charge against him would be concerned, and the suggestion contained in the instruction would be nothing more or less than what every intelligent juror would know would be the result of a verdict of not guilty. It would, perhaps, be difficult to say, as matter of law, that the instruction for that reason is erroneous, yet it would also be difficult to say whether or not the objectionable language would or did result in any prejudice to the prisoner on trial. It perhaps might tend to do so, and if so it would be objectionable.

But it seems to us that counsel have entirely omitted the vital objection to this instruction, and this being a case involving the life of plaintiff in error, and the instruction being excepted to, it is the duty of the court to protect him. The jury are told by it that if they are "*satisfied* from the evidence that the defendant was at the time of the killing *insane*, aside from being under the influence of liquor," they should acquit him. In *Wright v. The People*, 4 Neb., 407, Chief Justice Lake, in discussing the rule of law in cases involving the insanity of a person charged with crime, lays down the rule as follows: "We hold the true rule to be that whenever there is testimony tending to rebut the legal presumption of sanity, the jury should be instructed, substantially, that unless they are satisfied beyond a reasonable doubt that the act complained of was not produced by mental disease, the accused should be acquitted on the ground of insanity." This is now the well-established law

of this as well as many other states, and was so given to the jury in this case by the trial court in the twelfth instruction; but by an oversight, or through inadvertence, perhaps, this instruction was allowed to go to the jury without observing the import of the language which it contained. There was *some* evidence—however slight is immaterial—tending to prove the insanity of plaintiff in error. This evidence changed the burden of proof onto the state, and it was not for the jury to be “satisfied from the evidence that the defendant was at the time of the killing insane,” before they could acquit, but it was for them to be satisfied of his *sanity beyond a reasonable doubt* before they could find him guilty. The instruction, in this respect, was erroneous, and the giving of another correct instruction could not cure it. *Wasson v. Palmer*, 13 Neb., 376.

Instruction numbered sixteen and a half is complained of as not being based on or called for by the evidence in the case. As another trial must be had, we need not here copy the instruction nor discuss the evidence, as the testimony in the subsequent trial will probably differ somewhat from the testimony in this record. It is well settled that the instructions must be based on the evidence. *Meredith v. Kennard*, 1 Neb., 319. *Neihardt v. Kulmer*, 12 Id., 38. *City of Orete v. Childs*, 11 Id., 257.

On account of the errors above noted the judgment of the district court is reversed, and a new trial ordered. The cause is remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

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T. J. HITTE, ADMR., PLAINTIFF IN ERROR, V. THE  
REPUBLICAN VALLEY RAILROAD COMPANY, DE-  
FENDANT IN ERROR.

**Railroads: NEGLIGENCE DURING CONSTRUCTION.** A railroad company which has entered into an agreement with a contractor to build a portion of its railroad, and whose locomotives, cars, etc., used in such construction, are run exclusively under the direction and control of the contractor, will not be liable for damages occasioned prior to the completion of the road, by reason of the negligence of the persons running such locomotives and cars.

ERROR to the district court for Nemaha county. Tried below before DAVIDSON, J.

*Thomas B. Stevenson* and *Edwin J. Murfin*, for plaintiff in error.

*T. M. Marquett* and *J. W. Dewesse*, for defendant in error.

COBB, J.

This action was brought in the district court of Nemaha county by the plaintiff in error against the defendant in error for damages alleged to have accrued to the plaintiff in error, as administrator, for the negligence of the servants and employes of the defendant railroad company, by means of which the intestate of plaintiff was run over and killed by the cars of defendant.

There was a trial to a jury, which, by direction of the court, found a verdict for the defendant.

There is but one question presented by the record in this case to which it is deemed necessary to direct our attention, and that is, whether, under the law and the facts as shown by the evidence preserved in the bill of exceptions, the de-



defendant was responsible for the manner of running and operating the train at the time and place of the accident.

It appears from the testimony of plaintiff's witnesses that the railroad was being built; that the plaintiff's intestate was run over and killed, or, rather, in the language of the witness C. C. Donald, "while they were laying the iron or surfacing." This witness, as well as others, speaks of the train by which Hitte was killed as a construction train. I assume it, then, to have been clearly proved by plaintiff's own witnesses that the road was being constructed, and had not been finished or opened for business or traffic at the time of the injury.

From the evidence of the defendant it appears that part of its road lying between Nemaha City and Tecumseh was built by John Fitzgerald, under contract with the defendant company; that the said road was unfinished and being constructed at the time of the said injury; that the engine and cars by which said injury was inflicted were in the care and custody, and were being run, operated, and managed by the servants and hired men of the said John Fitzgerald, and not of the defendant. The following clauses of the contract between defendant and the said John Fitzgerald are deemed material, as showing the contractual relations between said company and said contractor in reference to the responsible use of the engine and cars, through which the injury in question occurred.

"This indenture and agreement, made this first day of October, 1880, by and between the Republican Valley Railroad Company, party of the first part, and John Fitzgerald, party of the second part, witnesseth: That the party of the second part, in consideration of the covenants, promises, and agreements of and in behalf of the party of the first part, will, and hereby does agree, covenant, and promise, to and with said party of the first part, to construct, that is to grade, bridge, and lay track over that part of the Republican Valley railroad as now located, from a point

on the Nebraska railway at or near Nemaha, in Nemaha county, Nebraska, to a point in the north-west quarter of section 28, 15 N., R. 14, and provided said party shall desire it, from the latter point on a line hereafter to be decided upon to a point on the Atchison and Nebraska railway at or near Tecumseh, a distance of 33 miles. \* \* \* All work must be done in strict accordance with the specifications hereto attached, which specifications are a part of this contract, and under the directions and to the satisfaction of the engineer in charge of said railroad to be constructed, whose orders in all matters relating to this contract the second party agrees implicitly to obey. \* \* \* The party of the first part agrees to furnish the necessary cars. \* \* \* The party of the first part agrees to attend to the usual and common repairs of engine and cars necessary during their usage by the party of the second part, but party of the second part will be held responsible for any damages or breakage done to said trains through neglect or disobedience of established rules by itself, agents, or employes, or through defects in road while constructing the same." \* \* \*

The greater part of the brief of plaintiff in error is devoted to a discussion of alleged errors on the part of the court in refusing to instruct the jury upon the question of negligence, in its several aspects and bearings, as applicable to the defendant, and of contributory negligence as applicable to the plaintiff's decedent. I do not feel called upon to express any opinion as to whether there was any evidence of negligence in the running and management of the construction train which caused the injury, as the case turns upon the question of the responsibility of the defendant for the running and management of said train at the time of the injury.

The case of *Hughes v. Railway Co.*, 89 O. S., 461, cited from XV. A. & E. R. R. Cases, 100, was brought by Hughes against the railway company, "for that in con-

structing its railroad through her lands, the defendant had wrongfully piled large quantities of waste dirt upon her arable lands not embraced within the right of way, to her damage," etc. An issue of fact having been joined, a jury was impaneled and the plaintiff offered testimony. After the plaintiff closed her testimony, the court, on motion of defendant, directed the jury to return a verdict for defendant, which was done accordingly. The judgment on this verdict was affirmed in the supreme court.

It appears from the report of the case that the work of building this road was done by contractors under a contract with the railroad company containing provisions substantially the same as those herein quoted from the contract between the defendant company and the contractor Fitzgerald. In the opinion the court say: "The work of constructing a railroad is not corporate work unless it be done by a corporation through its agents and servants, and a person may contract with a railroad company to construct its road without becoming its agent or servant.

"This proposition, therefore, resolves itself into a single question: May a railroad corporation, having power to contract as fully as a natural person in relation to its corporate business, enter into a contract with another person for the construction of its road, without retaining control over the mode and manner of doing the work? We can see no reason to doubt it. Of course any condition imposed upon the right to construct its road must be performed, and the company cannot shift its responsibility for the performance. But this is no new principle, nor one applicable to railroad corporations alone. Where a right is possessed by a natural person and a duty is attached to the exercise of the right, such duty must be performed. Such natural person cannot relieve himself from liability through the intervention of an independent contractor. On the other hand, where the law exempts a natural person, as employe, from liability for the wrongful act of his contractor, it will

also, under like circumstances, exempt a corporation, as employe, from liability for the wrongful act of its contractor." To the same purport are the cases of *Hunt v. Pennsylvania Railroad Co.*, 51 Penn. St., 475, and *McCafferty v. The Spuyten Duyvil R. R. Co.*, 61 N. Y., 178, cases cited by counsel for defendant.

In the case at bar Fitzgerald was clearly an independent contractor. He had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him, and if the engineer and fireman of the train which did the damage were borne upon the pay rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, which does not fully appear from the evidence, doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train, consisting of an engine, tender, and one or two flat cars, which struck and killed plaintiff's decedent, was not being run by nor under the control or management of the defendant company, and that the defendant is not bound to respond to any damage, if any, suffered through or by reason of the negligence of the engineer, conductor, or other persons in charge of the said train.

The plaintiff contends that the court erred in admitting the contract between defendant and Fitzgerald to be read in evidence, first, because said contract was not proven, and secondly, because it was immaterial, irrelevant, and incompetent. As to the first ground of objection it will be seen by reference to the bill of exceptions that the execution of the contract by Fitzgerald on his part was fully proven by the testimony of the witness Deweese, and the defendant having acted under the contract and claimed the benefit of its provisions would be estopped to deny any of its obligations, and even as against a stranger, I think, it may introduce the contract as the best evidence of the terms and relations which at the time of the occurrence

Schribar v. Platt.

upon which the action was based existed between defendant and the contractor. As to the second ground, we have seen that the contract or contractual relation between the defendant and the contractor was not only material and relevant, but that, even admitting for the sake of the argument that plaintiff's decedent was killed through the negligent management of the train in question, in our opinion the question of the liability of the defendant therefor would turn upon the fact of said work being done by the defendant through its servants and employes, or by an independent contractor. The contract upon which the road was built and paid for then was neither immaterial nor irrelevant.

The judgment of the district court is affirmed.

## JUDGMENT AFFIRMED.

THE other judges concur.

JOHN SCHRIBAR ET AL., APPELLANTS, V. J. T. PLATT  
ET AL., APPELLEES.

**Judgment Lien: CLOUD ON TITLE.** A occupying land as a homestead gave a bond to convey it to B and wife, and afterwards executed a deed thereof to B. In an action by B and wife to clear their title of the cloud claimed by reason of a judgment obtained against A prior to the conveyance by him, and a sheriff's deed made in pursuance of a sale under such judgment, and to quiet the title in themselves, *Held*, 1. The judgment and proceedings thereunder were no lien or claim upon the land. 2. B by simply paying attorneys for resisting the confirmation of the sale is not estopped from asserting title to the land. 3. B holds the land in trust for himself and wife.

APPEAL from the district court of Fillmore county.  
Heard below before MORRIS, J.

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31	862
19	625
36	852
37	812
19	625
42	749
19	625
48	486
48	936
19	625
49	720
50	64
53	555
53	620
54	220
19	625
56	281
56	461
19	625
62	230

*J. W. Eller*, for appellants.

*J. Jensen and Ryan Brothers*, for appellees.

COBB, J.

This action was brought in the district court of Fillmore county by John Schribar and Catherine Schribar, his wife, against J. T. Platt & Co. and other defendants. The action is in the nature of an action *quia timet*; and its object that a certain sheriff's deed of the real property described in the petition made to J. T. Platt & Co. upon a sale on execution in their favor and against one George W. Mesarvey, as well as certain judgments in favor of the other defendants and against the said George W. Mesarvey, might be declared to have conveyed no title and to be no lien upon the said land.

It does not appear from the record that either of the defendants other than J. T. Platt & Co. ever appeared or answered in the case or were ever served with process, so they need not be further noticed. The ground of plaintiff's cause of action against J. T. Platt & Co. is, that the land was an United States homestead, as well as an exempt homestead under the homestead law of this state, in the hands of said George W. Mesarvey, who was the head of a family and residing on and cultivating said tract of land, which was less in quantity than one hundred and sixty acres, and of less value than two thousand dollars at the time of the sale of the same by the said George W. Mesarvey to the plaintiffs and the entering upon and taking possession of said land by the plaintiffs. Also that the indebtedness upon the judgment in favor of the said J. T. Platt & Co. and against the said George W. Mesarvey, and upon which the said land was sold, was contracted before the issuance of the patent for said land by the United States. There are other points made by the plain-

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Schribar v. Platt.

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tiffs in their petition against the proceedings of the said J. T. Platt & Co. whereby they obtained the deed to the said land, to-wit, a misdescription of the judgment and of the transcribing thereof; and that the first execution issued by the said J. T. Platt & Co. against the said Mesarvey, together with the levy thereof and the appraisement of the said land and the marshaling of liens thereon, were, by the sheriff, under the orders and directions of the said J. T. Platt & Co., abandoned and set aside, another execution issued, and other proceedings had thereunder, including the sale of said land and its purchase by the said J. T. Platt & Co.

The plaintiffs in and by their said petition set up and claimed title to the said land by virtue of a title bond therefor executed by George W. Mesarvey and Elizabeth Mesarvey, his wife; also by virtue of a warranty deed executed by the same parties in pursuance with said bond. The said J. T. Platt & Co., defendants, in and by their answer denied that the deed made by said Mesarvey and wife on the 12th day of June, 1882, was made in pursuance with the agreement contained in said bond, but that it was made and executed under another agreement, and that the consideration therefor was never paid by the said John Schribar or any one for him, and that no delivery of said deed was had at the time, but that said Schribar, failing to pay the purchase money, another contract was entered into between him and the said George W. Mesarvey on the ... day of June, 1882, stipulating that said Mesarvey should make a deed to Schribar upon the payment of a certain sum of money in said contract specified, and that said Schribar never complied with any of the stipulations in said agreement contained, and said defendants alleged that the judgment confirming the sale of said real estate under the execution is, and was at the time of filing plaintiff's petition, in full force, and not reversed, and that no proceedings whatever had been had to appeal

from said judgment of confirmation or to reverse the same.

The defendants also denied that the debt on which the said judgment was obtained against said Mesarvey was contracted prior to the issuing of the patent for said land by the United States, and allege that it was contracted subsequent to the 20th day of February, 1877, and became a lien on said real estate when the execution issued on said judgment and was levied thereon.

Defendants also alleged that the deed in plaintiff's petition described was not delivered to said Schribar until long after the confirmation of the sale of said premises under the said execution.

The cause was tried to the court, which found generally for the defendants, also specially as follows: "And that the issue raised as to the sheriff's deed made and executed to J. T. Platt and company by the sheriff of Fillmore county, pursuant to the order of this court, for the real estate in question in this suit, were all and singular settled and determined in the proceedings had under the sale therein and the confirmation thereof, and that said deed to J. T. Platt and company is in all respects a good and valid deed; and the court further finds that no delivery for the purpose of conveying title of the deed made the 12th day of June, 1882, by George W. Mesarvey and wife to John Schribar was ever had, and that it is, in fact, inoperative and void and can convey no title to the land described therein." With decree canceling the deed from Mesarvey and wife to Schribar, enjoining plaintiffs from setting up any claim to said land, etc.

There seems to have been no evidence in the case as to when the patent for the land was issued by the United States. So the question of United States homestead, though asserted by the plaintiffs in the petition, was denied by the defendants in the answer, and not being proved on the trial it drops out of the case. The allegation that



the eighty acre tract of land involved was the exempt homestead of George W. Mesarvey and wife, under the laws of the state then in force at the time of the making and delivery of the title bond by them to the plaintiffs, is alleged in the petition and not denied, though sufficiently proven at the trial.

There was no issue made in the pleadings as to the confirmation of the sale of the land on defendant's execution. The fact of such confirmation is alleged in the petition, and admitted as alleged by defendants in their answer, with the additional allegation as hereinbefore stated. There was then no propriety in admitting as evidence on the trial the motions to set aside and to confirm the said sale, nor of the affidavits to sustain, or in resistance of either of such motions, and no finding or judgment could be based thereon. But these papers were admitted not only to prove the so-called judgment of confirmation, but to lay the foundation for proof that one of the plaintiffs paid counsel for resisting such confirmation, and thus proving an estoppel where none had been pleaded.

The land in question was sold on execution, what was formerly called a *fi fa*. Without a statute requiring it no confirmation of such sale was necessary or known. We have a statute requiring a confirmation in such cases, and such statute should be strictly yet fairly construed. Let us examine the language of the statute and see what construction it will bear. The following is its language, code, § 498: "If the court, upon the return of any writ of execution or order of sale, for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provisions of this title, the court shall direct the clerk to make an entry on the journal that the court is satisfied with the legality of such sale, and an order that the officer make the purchaser a deed of such

lands and tenements ; and the officer on making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeable to the order of the court."

The learned district court seemed to be of the opinion, and so found, that the question of the title to said real estate was involved in, decided, and settled by the proceedings for the confirmation of the said execution sale. In that I think the court erred ; and that the only thing settled or adjudicated in the proceedings and order of confirmation, so-called, was as to the proceedings of the sheriff and those acting under and with him in the levy, appraisal, advertising, making, and returning of said sale. Counsel for appellees in their brief contend and cite numerous authorities to the point, that as there was evidence tending to prove that one of the plaintiffs paid attorneys for resisting the confirmation of said sale, that the title to said tract of land is *res adjudicata* as to the plaintiffs. The general purport and result of the doctrine of the cases cited is to the effect that a person, though not a party to a suit or proceeding at law, who avails himself of the provisions of law and places himself in a condition to appeal from the decision in case it should be adverse to his interest, by notifying his intention, having the testimony reduced to writing at his expense, and the like, will be regarded in a sense as a party to the record, and may be concluded by it. See *Cecil v. Cecil*, 19 Maryland, 72. In the syllabus to this case the rule is stated thus: "Parties, in the larger sense, are all persons having a right to control the proceedings to make defense, to adduce and cross-examine witnesses, and to appeal from the decision if an appeal lies ; only those, therefore, who have enjoyed these privileges collectively should be concluded by a decision, judgment, or decree." It is scarcely necessary to say the evidence connecting the plaintiffs or either of them

with the proceedings for the confirmation of the sale of the premises involved in the case at bar fall far short of the rule as above stated.

Upon the other branch of the case it must be conceded that on the 17th day of March, 1882, the date of the title bond from George W. Mesarvey and wife to the plaintiffs, as well as on the 19th day of the same month, when said title bond was recorded in the office of the county clerk of the proper county, the land in question was the homestead of George W. Mesarvey and wife, and absolutely unscathed or affected by the claim or any lien of the defendants. In this condition of things the plaintiffs make the contract of purchase, as evidenced by the title bond, pay one-third of the purchase money, and give a negotiable promissory note for the balance. If this note was received by the Mesarveys as payment, and negotiated or pledged by them, then so far as the land transaction is concerned it was payment; and it does not lie in the mouth of any general creditor of Mesarvey's of that date to call it in question.

It further appears from the pleadings and evidence that on the 12th day of June, 1882, the said George W. Mesarvey and wife executed a deed of the said tract of land to the plaintiff John Schribar. There is some conflict, or rather confusion in the evidence as to the time when and purpose for which this deed was delivered. But it is obvious that the deed was executed, to be delivered in pursuance of the title bond; and I think that the evidence shows that it was delivered in pursuance of that general purpose. But who can question the purpose for which the deed was delivered. This, as well as other courts, has repeatedly held that an exempt homestead cannot be the subject of a fraudulent conveyance. So that if it be granted, as it must be, that the Mesarveys executed and delivered the title bond to the Schribars, and put them in the possession of their exempt homestead while it remained their exempt homestead, then it must also be admitted that no amount

of blundering, or fraud either, for that matter, between Schribar and Mesarvey can be made available to the creditors of the latter.

It is scarcely necessary to refer to the fact that the deed is made to John Schribar alone, while the title bond runs to John and Catherine Schribar; and Catherine Schribar is also a plaintiff and appellant in the case. As between them the title is doubtless held by John in part, in trust for Catherine Schribar.

The findings and judgment of the district court are reversed; and a decree will be entered in this court for the plaintiffs and against the defendants J. T. Platt & Co., in accordance with the prayer of the petition.

DECREE ACCORDINGLY.

THE other judges concur.

19	632
42	495
43	490
19	632
44	354

E. S. TOWLE, PLAINTIFF IN ERROR, v. T. C. SHELLY,  
DEFENDANT IN ERROR.

**Taxes: SALE: FORECLOSURE OF LIEN.** K. and G. were the owners of a certain city lot with a brick building thereon, except that two front feet of said lot extending the whole length thereof were owned in severalty by S. No taxes were paid on said lot; it went to sale for delinquent taxes. Not being sold for want of other bidders, it was bid in by the county commissioners, who assigned the certificate of sale to S. K. and G. became bankrupt; at a public sale of their estate said lot was bought by T. In a proceeding in equity in the nature of a proceeding *in rem* by S. to foreclose the lien for twenty-three twenty-fifths of said taxes upon the south twenty-three feet of said lot, T. answering and defending, *Held*, That S. was entitled to a judgment of foreclosure, and to ten per cent on the amount found, as an attorney's fees.

ERROR to the district court for Richardson county. Tried below before GASLIN, J., sitting in that county.

*Isham Reavis*, for plaintiff in error.

*Amos E. Gantt*, for defendant in error.

COBB, J.

This action was brought in the district court of Richardson county for the purpose of foreclosing a tax lien on a certain lot in Falls City.

It is alleged in the petition that this lot was sold by the county treasurer of said county on the 7th day of November, 1877, for the taxes of the year 1876 and previous years, to Richardson county; that the said county afterwards sold and assigned to one B. M. Fox the certificate issued to said county evidencing such sale and purchase; that before the time allowed by law for the redemption of said lot from the said tax sale, the legal notice was given, and upon the expiration of such time of redemption, a tax deed of said lot was duly executed upon said certificate by the county treasurer of said county to the said B. M. Fox, and delivered to him, but that said deed failed to convey title to said lot for the reason that "there was levied by the county commissioners of said Richardson county against said property, as taxes for the year 1876, and which formed a part of the taxes paid on said tax sale for which said pretended deed was issued, a county insane tax, amounting to seventy-five cents in the aggregate, which said county insane tax was wholly unauthorized by law;" that the said lot was thereafter, on three several occasions, sold for delinquent taxes due thereon, by the county treasurer to the said B. M. Fox, for the several sums of money in said petition set out and specified, and certificates of sale therefor duly executed and delivered by the county treasurer of said county to the said B. M. Fox; that afterwards the whole of the said certificates, including the one upon which the tax deed was issued, were by the said B. M. Fox sold,

and for a valuable consideration duly assigned to the plaintiff. Also, that for the taxes of the year 1880 the said lot was by said county treasurer duly sold to Florence L. Vaughan, and a certificate therefor duly executed and delivered to her; which said certificate was, for a valuable consideration, afterwards by the said Florence L. Vaughan duly sold, assigned, and delivered to the plaintiff.

It was claimed in and by said petition that the proportion of the several sums paid for said lot at said several tax sales, which was properly applicable to and due upon the south twenty-three feet of said lot, the same being twenty-three-twenty-fifth parts of said several sums, together with interest thereon, remains unpaid and due to him, with a prayer that an account might be taken thereof, that the title of the said tax deed might be adjudged to have failed, and the amount found due upon such accounting, together with costs and attorney's fees under the statute, be decreed to be a lien upon said south twenty-three feet of said lot, etc.

There was an answer by the defendant E. S. Towle, in which he alleges that he "was the sole owner of the south twenty-three feet of said lot, and has been such sole owner since the 8th day of April, 1882; that he purchased said property, together with the two-story brick building situate thereon, at a public sale had by the assignee in bankruptcy of the bankrupt estate of Keim & Grable, the former owners thereof; that previous to the purchase aforesaid said lot 7, in block 71, in the city aforesaid, was partly owned by the plaintiff and the said Keim & Grable, and, with the exception of the year 1879, was assessed entirely to said Keim & Grable for the purpose of taxation; that for the year 1879 the south twenty feet of said lot, which was owned entirely by the bankrupt estate of Keim & Grable, was assessed for taxes to the real owners, and was afterwards sold for taxes to the amount of \$36.34, as charged in plaintiff's petition, and which this defendant

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Towle v. Shelly.

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admits is a charge on said land, less illegal taxes, and which defendant is ready and willing to pay, with reasonable interest, as the court may direct."

The said defendant in and by his said answer alleged that as to all the other sales and purchases of said lot for taxes as set forth in said plaintiff's petition "they are illegal and void and constitute no claims or liens upon said property, for the reason that said plaintiff was in every instance, except as above related, charged with the duty of paying a part of the taxes assessed on said lot," etc.

The plaintiff demurred to the said answer of defendant Towle by general demurrer, which said demurrer was sustained by the court, and the said defendant electing to stand upon his said answer, and failing to present other plea or answer to the said petition, the court found thereon for the plaintiff; that the said deed was null and void and that the same be set aside; that there is due the plaintiff, after all illegal taxes have been deducted on said tax certificates, the sum of \$626.12. The court also found that there was due the plaintiff as attorney's fees the sum of \$62.61; that the said sums be and constitute a first lien on the said south twenty-three feet of said lot, etc.

The said defendant brings the cause to this court on error. The only question presented by this record, although the same is presented in several ways, is whether the facts alleged in the answer of the defendant, to-wit, that he, the said defendant, "was the sole owner of the south twenty-three feet of said lot, and has been such sole owner since the 8th day of April, 1882; that he purchased said property together with the two-story brick building situate thereon at a public sale had by the assignee in bankruptcy of the bankrupt estate of Keim & Grable, the former owners thereof; that previous to the purchase aforesaid said lot \* \* \* was partly owned by the plaintiff and the said Keim & Grable, and, with the exception of the year 1879, was assessed entirely to the said Kiem and Grable for the purpose of taxation," amounts to a defense.

There can be no doubt that when the defendant Towles purchased the south twenty-three feet of said lot "together with the two-story brick building thereon" at bankruptcy sale, he bought it subject to the unpaid taxes due thereon, and did not take said property discharged of the lien of said taxes, by reason of the certificate therefor having fallen into the hands of the owner of the north two feet strip of said lot.

In some of the states, in former times, in cases where it was sought by means of tax proceedings to divest the title of the general owner, and acquire the title and possession of valuable acres for cents paid for taxes, and where it was considered not only permissible but commendable to construe every possible technicality against such tax title, it has been held that where an owner of an undivided interest in a piece of real estate bought the interest of his co-tenant therein for delinquent taxes, he would be held to hold such title in trust for such co-tenant. This was the holding of the supreme court of Michigan in the cases of *Page v. Webster*, 8 Mich., 263, and *Butler v. Porter*, 13 Id., 292, and it is true that in the case of *Cooley v. Waterman*, 16 Id., 366, the doctrine of the two former cases was stretched to cover a case where two pieces of land owned in severalty by two owners, but wrongfully assessed together, were also sold together for the delinquent taxes of the whole and bid in by the owner of one parcel. I know of no other case where the rule has been carried to a case of ownership in severalty. As an individual member of the court, I do not consider the rule at all applicable to a case where it is not sought to divest title, but only to hold the property for taxes actually paid with simple interest and necessary costs. Nor do I think that it was founded upon substantial reason, even where invoked in defense of a tax title. In this connection I quote the language of C. J. Cole, of the supreme court of Wisconsin, in the case of *Frentz v. Klotsch*, 28 Wis., 312: "Now the doctrine that



one tenant in common will not be allowed to purchase in an outstanding title and avail himself of the benefit of such title as against his co-tenant, is limited and qualified by some of the authorities. The rule cannot be said to be one of universal application, but depends somewhat upon the facts of the particular case. Tenants in common are bound to deal fairly with each other, and when they stand in such confidential relations in regard to one another's interests that it would be inequitable to permit one to acquire a title solely for his own benefit and expel his co-tenant, then he will be treated as a trustee for the share of his co-tenant. But it is suggested by some of the authorities that tenants in common are probably subject to this mutual obligation to preserve the estate for each other, only when their interests accrue under the same instrument, or act of the parties, or of the law, or when they have entered into some engagement or understanding with one another; for it is said, persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests than would be required between strangers." See 1 *Leading Cases in Equity*, note to *Keech v. Sanford*, p. 196. *Roberts v. Thorn*, 25 Tex., 728. *Brittin v. Handy*, 20 Ark., 381.

I have never been able to see that the owner of an undivided share of a given lot or tract of land was under any greater obligation or duty to pay the taxes on the share that he did not own, than he was to pay the taxes on the adjoining lot or the one across the street. Cases and law books can be found in which such is assumed to be the law, but I have yet to see a reason given for it. Equally but no more unsatisfactory, to my mind, is the conclusion reached in the case of *Cooley v. Waterman*, *supra*, which, as I understand it, amounts to this: That the unlawful act of an assessor in joining the distinct tracts of land belonging separately to A and B in one assessment, imposes the duty

on A to pay his own taxes before he can be permitted to bid off the land of B at the tax sale, while all the balance of the non tax-paying world may freely bid. But this is only one of the extreme positions which the ablest courts have taken when in stress of a reason for refusing to execute the taxing laws, when the effect of such execution would be to sanction the passing of the title to land on tax sales.

Do the facts stated in the answer disclose any duty on the part of the plaintiff to pay the taxes on the part of the lot in question, and if he had have paid them, or did pay them under a duty, would he not still have a lien on the property therefor which a court of equity would enforce?

The lot in question appears to be of twenty-five feet front. The plaintiff was the owner in severalty of two front feet extending along the north side for the entire length of the lot. Whether there was any improvement upon or any one in the actual possession of these two feet of ground does not appear, either from the petition or the answer. It does appear that the portion of the lot in question, the south twenty-three feet, was occupied by a two-story brick house owned by the defendant and his grantor. Whether this two-story brick building occupied the whole frontage of the lot, including the two front feet, the legal title of which was in the plaintiff, does not appear, and probably cannot be presumed; but upon well-known principles of pleading, and especially as it does appear that for each of the years but one the entire lot was assessed to the assignors of the defendant's grantor, it will be presumed that for the whole of the time involved those whom the defendant succeeds in the title were in the actual possession of at least the south twenty-three feet of the lot, and that the plaintiff was not in the actual physical possession of any part of the lot. Such being the case, I do not think that the plaintiff was under any duty or obligation to pay the taxes on that part of the lot which

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Doll v. Hollenbeck.

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he did not own; and that when he submits to the cancellation of two-twenty-fifth parts of the amount of said taxes he is entitled to a decree for the balance with interest.

As to the constitutional question presented in the brief of counsel for the plaintiff in error, I will only say that that point has not been considered. It does not seem to have been presented to the district court, nor in this court, when the cause was previously here and disposed of by opinion in 16 Neb., at pp. 194, 196, so it cannot be considered now.

The award to the plaintiff of \$62.61 as attorney's fees, made by the district court, seems to be in strict accordance with the provisions of section 181 of the revenue law, Comp. Stat., ch. 77.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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WILLIAM DOLL, APPELLANT, V. HORACE S. HOLLENBECK  
ET AL., APPELLEES.

19	639
34	514
19	639
54	108
65	192
19	639
57	425

**Mortgage Foreclosure: USURY.** In an action of foreclosure the defense of usury is available to the maker against an assignee of an usurious note and mortgage which had been transferred to him by a written assignment on the mortgage only, for value before maturity, and without notice of any defect.

APPEAL from the district court of Douglas county.  
Heard below before WAKELEY, J.

*C. A. Baldwin*, for appellant.

*O'Brien & O'Brien*, for appellees.

COBB, J.

This action was brought in the district court to foreclose a mortgage. The appellant was plaintiff in that court and the appellees were defendants. The plaintiff in his petition alleged that on the 25th day of March, 1880, the defendants made their note for \$700, payable two years from date to August Doll, with interest at ten per cent, and to secure the same gave a mortgage on certain lands in Douglas county. That on the 24th day of January, 1882, August Doll, for a valuable consideration, sold, assigned, and transferred said note and mortgage to William Doll, the plaintiff, who thereby became and now is the *bona fide* owner and holder thereof. The defendants by their answer admit the making of the note and mortgage, but allege that the note was given for an old note; that the old note was founded on an usurious contract, thereby affecting the note sued on; and the defense of usury is relied upon.

The plaintiff by his reply alleged that he knew nothing of the transaction between the original parties to the note and mortgage, and that he is a *bona fide* owner without any notice whatever of any defense to the note.

The cause was tried to the court, which found:

"1. That the defendants Horace S. Hollenbeck and Eugenie Hollenbeck executed and delivered to August Doll the mortgage deed set forth in the petition on the following described real estate. \* \* \* That said mortgage was duly recorded. \* \* \* That on the 24th day of January, 1882, and before maturity of the note, said August Doll, for a good and valuable consideration, sold, assigned, and transferred said note and mortgage to said Wm. Doll.

"2. That the plaintiff is the owner of the note and mortgage in controversy by virtue of an assignment of the same endorsed on the mortgage January 24th, 1882, pay-

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Doll v. Hollenbeck.

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ing value therefor and having no knowledge or notice of a defense thereto.

"3. The note not having been endorsed according to the law merchant, the plaintiff holds the same as well as the mortgage, subject to any defense which could be made against the same if still held by the payee.

"4. The \$500 note mentioned in the answer was usurious, and the note in controversy being given in part in renewal thereof, is consequently usurious; no interest can be recovered, and all payments made thereon must be deducted from the principal.

"5. The amount of payments made on the note is \$459.25.

"6. And the court finds there is due to the plaintiff upon the note set forth in the petition, which said mortgage was given to secure, the sum of \$40.75, and that the plaintiff is entitled to a foreclosure of said mortgage as prayed."

A decree was entered in accordance with the said findings, and the plaintiff brings the cause to this court on appeal.

There is no point upon the facts or evidence in the case; on the contrary, appellant in his brief "admits that the old note was usurious, and that as against the original payee, August Doll, usury would be a good defense." It is not claimed that the note was endorsed by the payee. The following is a copy of the note taken from the transcript:

"\$700.00.

OMAHA, NEB., March 25, 1880.

"Two years after date I promise to pay to August Doll or order seven hundred dollars for value received, negotiable and payable, without defalcation or discount, at the banking house of Caldwell, Hamilton & Co., at Omaha, Nebraska, with interest at the rate of ten per cent per annum from date until paid, interest payable annually.

"HORACE S. HOLLENBECK."

The note being thus payable to August Doll, *or order*, it must have been endorsed by him in order to the transfer

of the legal title, and the plaintiff, without such endorsement, took it as a mere chose in action, subject to all equities or other defenses that attach to it in the hands of the payee, notwithstanding that he purchased it for full value and without notice of any defect. See Daniel on Negotiable Instruments, §§ 664 and 741, and authorities there cited.

Counsel for appellant cites section 31 of our civil code, which is as follows: "In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense now allowed; but this section shall not apply to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith, and upon good consideration before due." This section should be read in connection with the two preceding ones, and it should be borne in mind that before the adoption of the code actions at law were not necessarily brought in the name of the real party in interest, nor could they be in cases of transferred or assigned choses in action; but had to be brought in the name of the original beneficiary, for the use of the assignee or transferee. The object of the enactment of the 29th and 30th sections of the code was to do away with the necessity of uses and trusts, in the matter of bringing and prosecuting actions at law; and the object of the 31st section was to prevent such change in the practice affecting injuriously the rights of defendants. But as the rule which was thus being changed never had any applicability to *negotiable* paper, the latter clause of said section was added *ex majori cautela* lest the language of the first clause might be construed to change the existing law applicable to such securities.

"Negotiable instruments may also," says Daniel, "be assigned by a separate and distinct paper, although not delivered, as by deed or mortgage, conveying them specifically or all 'chose in action'; but it has been held that such an assignment carried only the equitable and not the legal title." *Id.*, § 748a. In all such cases the assignee takes

such instrument, subject to all legal and equitable defenses which adhered to it in the hands of the assignor.

Counsel for appellant in his brief claims that as the mortgage was assigned by the mortgagee to plaintiff and such assignment being in writing on the back of the mortgage, the same may be construed into an endorsement of the note, the mortgage being regarded as an *allonge*. On this point, I again quote from Daniel: "It is not necessary, however, that the endorsement should be upon the original bill or note, in order to constitute it such in the full sense of the term. It sometimes happens that by rapid circulation from hand to hand the back of the paper is completely covered by endorsements; and in such cases the holder may tack or paste on a piece of paper sufficient to bear his own and subsequent endorsements, and thereon the endorsements may be made. Such addition to the original instruments is called an *allonge*, and it becomes, for the purposes above named, incorporated as a part of it." Id., § 690. Webster defines the word *allonge* to mean, "A paper attached to a bill of exchange for receiving endorsements too numerous to be written on the bill itself." In the case at bar, the mortgage and note were not attached or fastened together; and had they been, as there was plenty of room remaining blank on the back of the note for endorsements thereon, it would be a forced and inadmissible construction to treat the mortgage as an *allonge* of the note. The case of *Crosby v. Roub*, 16 Wis., 645, cited by counsel for appellants, is not strictly applicable; but even if it were, candor compels me to say, that much as I respect that court, and especially the late distinguished judge who wrote the opinion, it could not, with our present views of the law, be followed in this court. Messrs. Vilas and Bryant, in their syllabus to that case in the annotated edition of Wisconsin Reports, fall into the error of citing *Carpenter v. Longan*, 16 Wall., 271, and *Kenicott v. The Supervisors*, Id., 452, as affirming *Crosby v. Roub*; but an ex-

644 SUPREME COURT OF NEBRASKA,

Bradshaw v. State.

amination of those cases will show that the point was not involved in either of them.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	644
21	327
21	328
19	644
31	244
19	644
00	688

ENOCH BRADSHAW, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: NEW TRIAL.** The grounds upon which a new trial may be granted in a criminal case are prescribed by statute and the motion therefor must be filed at the term at which the verdict is rendered, and, except for newly discovered evidence, within three days after the verdict was rendered, unless unavoidably prevented.
2. ———: ———. One B. was convicted of murder in the second degree and sentenced to imprisonment for life. More than two years after the judgment was rendered he filed a motion for a new trial in the district court where he was tried upon the ground of newly discovered evidence, and supported the motion by affidavits. The district court dismissed the proceedings. *Held*, Not erroneous.

ERROR to the district court for Gage county. Tried below before BROADY, J.

*Colby, Hazlett & Bates* and *L. C. Burr*, for plaintiff in error.

*William Leese, Attorney General*, for the state.

MAXWELL, CH. J.

In May, 1883, the plaintiff was indicted in the district court of Gage county for the murder of one Henry Voor-



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*Bradshaw v. State.*

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heis, and was arraigned, and plead "Not guilty." On the trial of the cause the jury found him guilty of murder in the second degree, and he was sentenced to imprisonment for life. The case was brought into this court for review, and no error found in the record. The judgment was therefore affirmed. *Bradshaw v. State*, 17 Neb., 147.

In October, 1885, certain relatives of the plaintiff filed a motion in his name for a new trial in the district court of Gage, upon the ground of newly discovered evidence, and filed a large number of affidavits made by different persons, containing statements and allegations which, if true, go far to explain the plaintiff's conduct, prove an alibi, and at least cast a doubt upon the correctness of the verdict of guilty. The district court overruled the motion, apparently on the ground that the statute did not authorize the proceeding, and the cause is again brought into this court on error. The attorney general now moves to dismiss the proceedings for want of jurisdiction. The question presented is, the authority of the district court to entertain a motion for a new trial filed after the expiration of the term at which the judgment was rendered. The subject is regulated entirely by statute.

Section 490 of the criminal code provides that, "a new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons, affecting materially his substantial rights: 1st. Irregularity in the proceedings of the court, or the prosecuting attorney, or the witnesses for the state, or any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial. 2d. Misconduct of the jury, or the prosecuting attorney, or witnesses for the state. 3d. Accident or surprise which ordinary prudence could not have guarded against. 4th. That the verdict is not sustained by sufficient evidence, or is contrary to law. 5th. Newly discovered evidence material for the defendant, which he could not with reasonable diligence

have discovered and used at the trial. 6th. Error of law occurring at the trial."

"Sec. 491. The application for new trial shall be by motion upon written grounds *filed at the term the verdict is rendered*, and shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be within three days after the verdict was rendered, unless unavoidably prevented," etc.

Sec. 492 requires the causes enumerated in subdivisions 2, 3, and 5 of section 490 to be sustained by affidavits, and their truth may be controverted by affidavits. The plaintiff's attorneys admit that these provisions do not give the plaintiff a right to file a motion for a new trial more than two years after the trial took place, but they claim relief under section 318 of the civil code, which authorizes a petition for a new trial to be filed not "more than one year after the final judgment was rendered." If we should hold that this section was applicable to criminal cases, still the plaintiff would not be entitled to relief, as the motion or petition was filed more than two years after the final judgment was rendered.

In *Kountz v. The State*, 8 Neb., 294, it was held, that from the peculiar language of section 508 of the criminal code, that the limitation of time for taking criminal cases on error to the supreme court was the same in criminal as in civil cases. The section was copied *verbatim* from another state, where the allowance of a petition or writ of error involved an examination of the entire record to ascertain if there was probable error in the record. In such cases a writ of error was to be allowed *as in civil cases*. This would seem to mean in the same manner and within the same time as in civil actions. We find no similar provisions, however, in regard to new trials. The writer desires to add, that the rule permitting a petition for a new trial to be filed at any time within one year from the ren-

dition of the judgment in civil actions should, where there is newly discovered evidence, the effect of which is to cast doubt on the correctness of the verdict or show the defendant's innocence, be extended to criminal cases. Such a rule, in cases of conviction upon circumstantial evidence, if properly guarded and applied, would throw an additional safeguard around the innocent, and tend to the promotion of justice; but in the absence of legislation to that effect the courts are without authority in the premises, and the motion to dismiss must be sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRANK STEVENS, PLAINTIFF IN ERROR, V. THE STATE  
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: INFORMATION: WITNESSES.** It is by statute made the duty of the district attorney to endorse on an information the names of the witnesses known to him at the time of filing the same; and at such time *before the trial* of any case as the court may by rule or otherwise prescribe he shall endorse the names of such other witnesses as shall then be known to him. There is no provision authorizing the endorsement of additional names during the trial.
2. ———: **LARCENY.** Where a party feloniously took a coat which contained a watch in the pocket, of which he claimed not to be aware at the time of the taking, but which he appropriated, *Held*, That he was liable for all the property taken by him.
3. ———: **ROBBERY.** To constitute robbery the property must be taken by force or violence, and with the intent to rob or steal.
4. ———: ———. A person charged in an information with robbery may be convicted of larceny, as the greater includes the less offense.

ERROR to the district court for Cass county. Tried below before MITCHELL, J.

19	647
20	516
20	517
23	310
19	647
33	355
19	647
34	449
19	647
46	661
19	647
47	298
19	647
53	436
19	647
759	270
19	647
61	608

*S. P. Vanatta*, for plaintiff in error.

*William Leese, Attorney General*, for defendant in error.

MAXWELL, CH. J.

The plaintiff was convicted of robbery at the December term, 1885, of the district court of Cass county, and sentenced to imprisonment in the penitentiary for three years.

The first error relied upon is, that the evidence is not sufficient to warrant a verdict of guilty of the offense charged. For reasons stated in this opinion a new trial must be granted; therefore we will not comment upon the evidence; but if the only error relied upon was that the verdict was against the weight of evidence, it would not be set aside. The first objection, therefore, is not well taken.

2. That the court permitted two witnesses, whose names were not endorsed on the information before the trial, to testify over the objection of the plaintiff.

Sec. 579 of the criminal code, provides that "all information shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto and indorse the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may by rule or otherwise prescribe, he shall endorse the names of such other witnesses as shall then be known to him."

It will be seen that the prosecuting attorney is required to endorse on the information the names of *all the witnesses known to him* at the time of filing the information; and at such time *before the trial* as the court may by rule or otherwise prescribe ~~prescribe~~ he shall endorse thereon the names of such other witnesses *as shall then be known to him*. This is an entirely new provision, that no doubt was intended to apprise the accused in advance of the trial what witnesses

would testify against him, and thus enable him to make preparation for the production of testimony in his own behalf, or if some of his witnesses are absent that he may be able to make a satisfactory showing for a continuance. The evident object is to avoid surprise to the accused. A number of the provisions of our criminal code are copied substantially from the statutes of Illinois, some sections verbatim. In *Gardiner v. People*, 3 Scam., 89, and *Gates v. People*, 14 Ill., 435, it was held without a provision similar to section 579, that where the prosecution was aware of the existence and necessity of evidence before the commencement of the trial, it was usual to require him to give the accused notice of his intention to call such witnesses, so that the accused could apply for a continuance if he saw fit. There is no hardship in this rule, and it is clearly in furtherance of a fair trial, and being a positive provision of the statute it cannot be disregarded. The cases cited on behalf of the state from Kansas do not seem to be based on a statute similar to ours.

In *State v. McKinney*, 31 Kas., 576, it is said: "There is nothing in the rule of the court quoted in the record which substantially abridges this discretion (of the court), or which renders the action of court in this case subject to just exceptions." But there seems to be no discretion as to such endorsement given to our courts by the statute. The court therefore erred in permitting the prosecuting attorney to endorse the names of Patrick Kinney and William Duggan on the information during the progress of the trial, and then immediately call them as witnesses.

3. That the court erred in refusing to give the following instruction: "The defendant is charged with robbing one Oliver Scott of one overcoat and one watch. If you find from the evidence that at the time of the taking of said coat the watch was in the pocket of the coat, and that the defendant did not know it was there, but afterwards found it there, then he could not be charged with the in-

tent to rob him of the watch, and the fact that the watch was afterwards found on the person of the defendant and in his possession, is not sufficient to warrant you in finding him guilty of the robbery of the watch." It will not be seriously contended that the above instruction states the law correctly. The party took the coat which contained a watch, and appropriated all the property to his own use. There was but one act, and the party committing it is liable for all the property taken by him. The instruction was therefore properly refused.

4. The plaintiff asked the court to give the following instruction, which was refused:

"The fact that the defendant took the property in question from the person, and that it was afterwards found in his possession, is not sufficient to convict him of robbery. You must further find from the evidence beyond all reasonable doubt that the defendant took it from the person by force and in spite of his resistance, with the intent to rob or steal, and unless you do so find you must find the defendant not guilty."

Sec. 13 of the criminal code provides that, "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatever, with the intent to rob or steal, every person so offending shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the penitentiary not more than fifteen nor less than three years." We find no instruction given by the court that covered the law stated in the above, and we think the instruction should have been given.

5. Objection is made that the court did not instruct the jury that they could find the plaintiff guilty of larceny if the proof failed to show sufficient evidence or putting in fear to constitute robbery. There is no doubt that a trial and acquittal for robbery is a bar to an indictment for larceny where the property alleged to have been taken is

the same. *The People v. McGowan*, 17 Wend., 386. In this case it is said by Cowen, J., speaking for the court: "The first indictment, though for a robbery, involved the question of simple larceny, of which the person under that indictment might have been convicted."

This is upon the principle that where several crimes are included one within the other, a conviction of the higher bars a prosecution for any lower, since the greater includes the less. And as a rule the same consequences follow an acquittal, because generally there can be a conviction for the lower on an indictment for the higher. 1 Bish. Cr. Law, § 682. *Lohman v. The People*, 1 Comst., 379. *Thayer v. Boyle*, 80 Me., 479. *State v. Townsends*, 2 Harrington (Del.), 546. In the case last cited it is said: "The plea of *autrefois acquit* is founded on the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation. 4 Cr. Rep., 40-43. Hawk. b. 2 c. 26, § 68-35, § 1, 4 Bl. C. The plea of *autrefois* convict depends on the same principle that no man shall be put in peril of punishment more than once for the same offense." \* \* \* "To plead *autrefois* convict with effect the crime must be the same in fact for which the defendant was before convicted, or *must be necessarily included in the former*."

In *State v. Lewis*, 2 Hawks, 98, where two indictments were found against a party at the same term, one for burglary and larceny and the other for robbery, and both indictments charged the same felonious taking of the same goods, the person was tried on the first indictment and found guilty of larceny. No sentence was passed on the prisoner under this conviction, and the Attorney-General directed a *nolle* to be entered on the indictment, which the court refused to permit. The Attorney-General then sought to arraign the prisoner on the indictment for robbery. The court say: "It is admitted in this case that both indictments are for the same felonious taking of the same

goods. The defendant is found guilty of grand larceny on that indictment which charges a burglary and stealing. The other indictment is for robbery; a robbery is a larceny, but of a more aggravated kind. The first is a simple larceny; the other is a compound or mixed larceny, because it includes in it the aggravation of a felonious taking from the person. Now suppose the defendant should be tried and found guilty on the second indictment? It must certainly follow that he had been tried twice for the felonious taking of the same goods." See also *Roberts v. State*, 14 Geo., 8.

The elements of robbery to be averred and proved are—first, a larceny; second, wherein the asportation is from one's person; and third, is effected by force or putting the person in fear. 2 Bish. Cr. Pro., § 1001. An indictment for robbery therefore includes larceny, and the accused may be convicted of that offense. It follows that the judgment of the court below must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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F. C. HOYT, PLAINTIFF IN ERROR, V. S. H. SCHUYLER  
ET AL., DEFENDANTS IN ERROR.

1. **Conveyance: FILING DEED: NOTICE.** Under section 19, chapter 43, of the Revised Statutes of 1866, a deed when filed for record in the county clerk's office and duly entered in the index, was constructive notice to all the world of the rights of the grantee conferred by such instrument.
2. ———: **QUIT CLAIM DEED: DEFECTIVE RECORD.** Where the grantor in a quit claim deed had previously conveyed the real estate, which deed had been properly entered on the index, but

19	652
32	437
19	652
39	743
19	652
49	189

19	652
57	290



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Hoyt v. Schuyler.

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defectively recorded, and it did not appear that the second grantee was a purchaser in good faith for a valuable consideration and without notice, *Held*, That the second purchaser was not entitled to protection.

3. ———: ———: TITLE: BONA FIDE PURCHASER. A party who claims title under a quit claim deed from a grantor who had previously conveyed all his right, title, and interest in the real estate to another, and the effect of the second deed, if sustained, will be to deprive the first grantee of his title, must make a clear case of *bona fides* on his part before his deed will be sustained.

ERROR to the district court for Richardson county.  
Tried below before DAVIDSON, J.

*J. B. Cope and Frank Martin*, for plaintiff in error, cited: *Libby v. Wolf*, 10 Ohio, 83. *Lessee of Jennings v. Wood*, 20 Ohio, 261. *Brown v. Banner Coal & Oil Co.*, 97 Ill., 214. *Edminster v. Higgins*, 6 Neb., 269.

*C. Gillespie*, for defendants in error, cited: *Lincoln B. & S. Ass'n v. Hass*, 10 Neb., 584. *Allen v. Holton*, 20 Pick., 458. *Walker v. Lincoln*, 45 Me., 67. *Caldwell v. Sigourney*, 19 Conn., 48.

MAXWELL, CH. J.

This is an action to quiet title. The defendants filed an answer to the petition, to which the plaintiff demurred, and the demurrer was overruled, to which the plaintiff excepted, and now assigns the same for error. The property involved is lot 12, block 31, in the town of Rulo, Richardson county. The defendants in their answer allege that James W. Hosford is the owner of said lot; that about the 6th day of May, 1871, one Frank Carter, being the owner of said lot, conveyed the same to Samuel H. Schuyler, one of the defendants, by quit claim deed; that on or about May 16th, 1871, said deed was duly filed for record in the county clerk's office of said county and correctly

indexed in the general index of deeds of said county ; that the index entries were double, showing the same alphabetically from grantor to grantee and to grantee of grantor in accordance with the statute regulating the record of transfers of real estate; a copy of the index is set out in the answer; that after indexing said deed correctly the clerk in recording the same in full upon the records by mistake and oversight recorded the description of the property as lot five, in block 31, instead of lot 12, in block 31; that on or about the 15th day of April, 1873, Samuel A. Schuyler conveyed said lot to James W. Hosford, one of the defendants, who caused his deed therefor to be duly recorded; that the plaintiff cannot claim to be a good faith purchaser of said lot, as he received only a quit claim deed for the same, and as Carter had conveyed all his right and title more than ten years before that date the plaintiff acquired no title, etc.

The plaintiff in his petition alleges, "that some time in and during the month of December, 1882, this plaintiff entered into negotiation for the purchase of certain building lots situated in the town or village of Rulo, Richardson county, Nebraska, among which was lot No. twelve in block No. thirty-one in Rulo proper aforesaid, with one Carter, who, sometime prior thereto, had been a resident of said Rulo, but who at the time of said negotiation was and for some time prior thereto had been a resident of Solomon City, Kansas; that said Carter, at the time of said negotiation, informed said plaintiff that he did not know what lots or property he owned in Rulo, and sent this plaintiff all of his deeds—among which was a warranty deed for lot No. 12 in block No. 31 in said Rulo—of the property to which he held title, and wrote and instructed this plaintiff to examine the records of Richardson county to find out and determine to which lots or property he held good title; that this plaintiff did thereupon examine said records, and found that he appeared

from said records to be the owner of certain lots in fee simple, among which was lot No. 12 in block No. 31 in said Rulo; that thereupon this plaintiff informed said Carter of the fact, and offered said Carter the sum of \$75 for four different lots, one of which was lot No. 12 in block No. 31 in said Rulo, and requested said Carter to execute a warranty deed for the same to this plaintiff in consideration thereof, which said Carter refused so to do, upon the ground—1st, that he did not actually know and could not actually say what building lots or what property he owned in said Rulo; and 2d, that he never had given any other kind of a deed than a quit-claim to property in Rulo, and never should or would, which latter fact this plaintiff found to be true, and thereupon accepted the quit-claim deed hereinafter set out; that afterwards, and on or about the second day of February in the year 1883, said Carter, in consideration of the sum of \$75, duly made and executed a quit-claim deed to this plaintiff of four several lots, one of which (No. 12, block 31) lots was held and was occupied by one Fred Evens, who claimed to be the owner thereof, and which, by reason thereof, the same was worthless to this plaintiff, and which fact was known to this plaintiff at the time of his purchase thereof; said lots were situated in the said town of Rulo; that said Carter sent said deed to this plaintiff by express, C. O. D., and this plaintiff, before accepting said deed, again examined the records of Richardson county as to the title of said Carter to lots, one of which was lot No. 12 in block No. 31 in said Rulo, and it appeared from said records that said Carter was the owner of said lots in fee simple absolute; that thereupon this plaintiff paid to the express company for the use of said Carter the sum of \$75, and express charges thereon, as and for the consideration of said lots and the title thereto, and thereupon this plaintiff delivered said deed to the county clerk of Richardson county for record, who thereupon duly and regularly recorded and indexed the same in the book of records thereof."

Sec. 18, chap. 43, Revised Statutes of 1866, which was in force when the deed from Carter to Schuyler for the lot in question was filed for record, was as follows: "The county clerk must keep an index, the pages of which are so divided as to show in parallel columns—1st, the grantor; 2d, the grantee; 3d, the time when the instrument was filed; 4th, the date of the instrument; 5th, the nature of the instrument; 6th, the book and page where the record thereof may be found; 7th, the description of the land conveyed, in the following manner:

Grantors.	Grantees.	Date of Filing.	Date of Instrument.	Character of Instrument.	Book.	Page.	DESCRIPTION.
A. B.	C. D.	1866. Jan. 1.	1866. Jan. 1.	Deed.	No. 1.	225.	(Description of land.)

Sec. 19. "The county clerk must endorse upon every instrument properly filed in his office for record, the minute, hour, day, month, and year, when it was so filed, and shall forthwith make the returns in the index provided for in the last preceding section, except that of the book and page where the record of the instrument may be found, and from that time such entries shall furnish constructive notice to all the world of the rights of the grantee conferred by such instrument."

Sec. 20 provides that the index shall be a double one, showing the names of the grantors and the other of the grantees.

These sections made the index of deeds constructive notice to all the world of the rights of the grantee conferred by the instrument. Probably such would have been the result without a direct provision to that effect. The legislature, in requiring an index and prescribing what it should contain, intended it for the purpose of rendering the contents of the records readily accessible. It was not intended

as a useless appendage, and still require that a purchaser, notwithstanding the index, must spend days or weeks reading the records to see if deeds exist which have not been indexed. The act providing for a numerical index did not become a law until 1873, and need not be considered here. *Metz v. State Bank*, 7 Neb., 165.

We hold therefore that the plaintiff received notice from the index of the conveyance from Carter to Schuyler, and is not entitled to the relief sought.

2. There is no allegation in the petition or claim in the brief of the appellant that he was a *bona fide* purchaser; while the circumstances of the case as well as the form of the conveyance repel the inference of a *bona fide* purchase. He alleges that Carter told him he did not know what lots or property he (Carter) owned in Rulo; but he sent the plaintiff all of his deeds, among which was a warranty deed for lot 12. Carter, however, refused to make a warranty deed, alleging that he never had given any other than a quit claim deed. This may be true, and still it will not help the plaintiff's case. He merely took the interest of Carter, and as he had previously conveyed all his right, title, and interest in the lot, the grantee under the second deed took nothing. It is the purchaser in good faith for a valuable consideration and without notice of defects in the title, or such knowledge as if proper inquiry were made would lead to notice, that is protected; and the plaintiff fails to show that he is entitled to such protection, while it is pretty clear that he is not. A party who claims title under a quit claim deed from one who had formerly conveyed his title to another, and the effect of which will be to deprive the first grantee of his title, must make a clear case of *bona fides* on his part before his title will be sustained. The answer states a complete defense to the action, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

## JOSEPH H. HALL, PLAINTIFF IN ERROR, V. JESSE B. STRODE, DEFENDANT IN ERROR.

1. **Attorney: ASSIGNMENT OF JUDGMENT TO: ACTION BY THIRD PARTY: PLEADINGS.** One S., an attorney at law, brought an action in favor of Mrs. C. against the city of P. for injuries sustained by her by falling into an excavation, and afterwards recovered \$1,000, which judgment he afterwards purchased and took an assignment of. Afterwards one H., the physician who had attended Mrs. C., brought an action against S. and alleged in his petition in substance that he had employed S. as an attorney to collect his claim against Mrs. C., while the action against the city was pending; that as such attorney S. had control of the judgment in favor of Mrs. C., who was willing to pay the claim of H., but that S. "failed, refused, and neglected to collect said claim or any part thereof, as he had agreed to do," and in disregard of his duties purchased said judgment, and took an assignment thereof to himself, whereby H. lost his claim, the answer being a denial, *Held*, That the issue raised by the pleadings was, whether or not Mrs. C. would have paid the claim out of the judgment if S. had sought to have such payments made, and was prevented from doing so by the assignment to S., and whether S. was employed as an attorney for H., and the question of the legal liability of Mrs. C. was not in issue.
2. **Trial: PLEADINGS.** A case should be submitted to the jury on the issues made by the pleadings.
3. **Parties.** If a defect of parties does not appear on the face of the petition, and is thereby corrected by demurrer, it must be pleaded in the answer, or it will be waived.

ERROR to the district court for Cass county. Tried below before MITCHELL, J.

*S. P. Vanatta and Beeson & Sullivan*, for plaintiff in error.

*Byron Clark and J. B. Strode*, for defendant in error.

MAXWELL, CH. J.

This case was submitted to the court at the July term, 1885, but as the court was in doubt on some of the propo-

sitions involved, a re-argument was ordered and the cause was again submitted at the present term. As the principal errors relied upon are in regard to the giving and refusing instructions, and that the verdict is against the weight of evidence, it is necessary to a full understanding of the case to set out the substance of the pleadings and evidence.

In October, 1884, the plaintiff filed his petition in the court below, in which he alleges that the defendant is an attorney at law; that about August, 1881, he employed defendant as an attorney to collect an account against one Sarah Collins, in favor of plaintiff, for the sum of \$59. That defendant accepted said employment and agreed to collect said account. That defendant, as the attorney of the said Sarah A. Collins, afterwards, and while he so held said account for collection, recovered a judgment in the district court of Cass county in her favor against the city of Plattsmouth for the sum of \$1,000, and had control thereof. That while defendant had control of said judgment, said Sarah A. Collins was willing to pay plaintiff's claim, so held by defendant for collection, out of said judgment, and defendant could, by the use of due diligence, have collected said claim. That defendant afterwards, in disregard of his duties to plaintiff, purchased said judgment from said Collins. That defendant failed, refused, and neglected to collect said claim or any part thereof as he agreed to do. That said Sarah A. Collins is insolvent and has no other property out of which said claim can be made. That by reason of said defendant failing, neglecting, and refusing to collect said claim out of said judgment, and by reason of defendant purchasing said judgment and having it assigned to himself, plaintiff has lost his said claim, and has been to great expense and trouble in and about trying to collect the same, to his damage in the sum of fifty-nine dollars, for which he claims judgment with costs.

On the 14th day of November, 1884, the defendant filed his answer, setting up his defense as follows: "Denies that

he is indebted to plaintiff in any sum whatever. Denies that on or about August, 1881, or at any other time, pl'ff employed him as an attorney at law to collect an account of about \$59, due from Mrs. Sarah A. Collins to plaintiff. Denies that he ever undertook to collect any such claim as alleged in plaintiff's petition, and denies each and every allegation of said petition."

On the 7th day of May, 1885, there was a trial to a jury, with verdict for defendant.

At the trial the following proceedings were had :

"Plaintiff testified that he was a physician and surgeon. That in the summer of 1881, Mrs. Collins fell into a cellar-way and received injuries, and that I attended her as a physician, and my bill amounted to \$59, which I gave to Mr. Strode to collect for me, as my attorney. No part of said bill has ever been paid. I knew that Mrs. Collins was not able to pay my bill, and as Mr. Strode had done business for me before, I gave him the account to collect. Told him to be sure and collect it; he said he would, asked me who it was charged to, told him to Jonathan Collins. He said the judgment will be in favor of Mrs. Collins and your bill cannot be collected from her if it is charged to Mr. Collins, and he advised me to change it to Mrs. Collins, which I did. Told him they could not pay the bill unless it was out of the judgment. Strode was prosecuting an action against the city of Plattsmouth for Mrs. Collins to recover damages for her injuries. Mrs. Collins recovered judgment against the city, and in May, 1884, I asked Strode when he could get some money out of the Collins judgment for me; he said he could not say just when, but the city council had levied a tax, and as soon as it was collected the judgment would be paid and I can get your pay out of the judgment for you. Frequently before that I had spoken to him about it and told him I wanted him to look after it. The conversation in May occurred in front of my house; Mr. Lindsey was present, Clark was



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Hall v. Strode.

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with Strode, and during the conversation he walked on. Had a conversation with him again in June, 1884, in front of Mayer's store; asked him about the collection of the judgment, and he said he and Smith had bought the judgment and it was assigned to him, and that he did not collect my account, that he came to my office to let me know that they had sold the judgment before the money was paid, but that I was not in and he could not collect it unless I was there. I said to him: 'I know better; you were my attorney; you could collect it; do you mean to deny that you said you would collect this account for me?' He said: 'No, doctor, I told you I would try and collect the account if I could.' I made no effort to collect the bill, because I had employed Strode to look after it."

## CROSS-EXAMINATION.

McCauley and Mayer were present at the last conversation. Strode had an office at the time he commenced the suit for Mr. Collins in the Fitzgerald block. Don't know who else was doing business there.

Q. 53. Don't you know as a matter of fact that Smith & Strode were acting as attorneys at that time, and at that place, in partnership?

A. No sir, I did not, nor I did not care, because I had transacted business with Strode before, and he brought in no partners at all.

Q. What business did Strode ever transact for you as an individual before that time?

A. Strode had not transacted any business before that for me that I know. The other business was in '82 or '83.

Q. 56. Did you not know as a matter of fact at that time, and for some time prior to that time, that Messrs. Smith & Strode were doing business in this office in the Fitzgerald block, advertised as such in the papers, and had a sign over the door, and held themselves out to the world as partners?

A. No, I did not. I did not take the account to the office of Smith & Strode for the purpose of having it put in the petition of Mrs. Collins. I was in Strode's office; don't know whether Mr. Smith was located in that office or not. I had been living in this town eight or nine years, and have known Mr. Strode and Mr. Smith during most of that time.

Q. 64. And you have known what business they were in?

A. Yes, sir. I know that Smith is a lawyer here, and Strode is a lawyer, and I knew the firms changed round a good deal, I went to Strode to put this account on the books. Mrs. Collins had told me he was her attorney in the case.

Strode said the account would be put into the petition but did not say he wanted it for that purpose; he said it was not necessary to make out an account in writing as he would have the account in the petition; there was nothing said about what he should have for collecting the account. Strode told me to change the account to Mrs. Collins, and I did so by writing the word Mrs. before Jonathan Collins on my books; Strode did not see me do it and I do not know whether he ever knew it was done.

I do not know whether they got a judgment for my claim, I only know that she got a judgment for \$1,000; I do not remember just when and where I first spoke to Mr. Strode about the bill after I put it into his hands for collection, nor just what was said, but I cautioned him that the parties were not able to pay only at the time they received their judgment, and I wanted him to be careful to get my claim.

The conversation at Mayer's store in June, 1884, was the last talk I ever had with him about it.

In the conversation at Mayer's store, he said I had not given him a written account, but said he had said to me, he would collect it for me if he could.

Q. Is it not a fact that Mr. Strode and Mr. Smith occupied this office there?

A. No, sir.

On re-examination plaintiff stated that he gave Strode the amount of the bill against Mrs. Collins; I asked him if I should write it out and he said no.

Jonathan Collins testified:

Reside in Plattsmouth; am the husband of the Mrs. Collins who was injured by falling in the cellar-way some years ago; I employed Mr. Strode to bring action against the city for my wife to recover damages for said injuries.

He told me Dr. Hall had put his bill in his hands for collection; he said the amount of the bill was \$57.00.

CROSS-EXAMINATION.

I went to see Mr. Smith about bringing the suit.

Q. Was he in partnership at that time with Mr. Strode? Plaintiff objected as irrelevant, immaterial, and not proper cross-examination. Objection overruled, plaintiff excepted.

A. Smith and Strode. Strode did not say he had this bill for collection from me or my wife, he said he had it for the purpose of collecting it in the judgment against the city; that was about the time they were commencing the suit against the city.

I am in such condition, financially, that this bill could not be made off of me, and have not been.

Sarah Collins testified.

Reside in Plattsmouth; am the wife of Mr. Collins who has just testified, and am the person who was injured by falling in a cellar.

Dr. Hall attended me during my sickness caused by the fall; Smith and Strode were my attorneys in the suit against the city for damages; Strode never said anything about the doctor's bill.

I sold the judgment against the city to Mr. Strode on the 17th day of May, 1884; at that time nothing was said about Dr. Hall's bill, and there was no understanding about it; I got \$400 for the judgment; I signed the paper; If I

had been requested at that time to permit Mr. Strode to keep back the amount of the doctor's bill I would have done so; would have paid the doctor's bill out of that money; I thought it was kept back; I was to get \$500 out of the judgment; I was to get one-half; I have never been able to pay the doctor's bill, and had no property liable to execution.

## CROSS-EXAMINATION.

The doctor's bill had never been presented to me and I did not know the amount of it; if the bill had been presented to me when I sold the judgment to Strode, I would have paid it then and there; I have never done any business separate from my husband; I was keeping house for him.

William McCauley testified:

Heard part of the conversation between Dr. Hall and Mr. Strode, in June, 1884; Mr. Strode, myself, and Mr. Mayer were talking together and Mr. Hall came along and said to Mr. Strode, "when is this Collins judgment going to be settled or sold," something to that effect, "I would like to have a little money out of it." Strode said "it is already sold." Hall said, "Who bought it?" Strode said, "Geo. Smith and myself." Hall said, "Did you collect mine?" Strode said: "No, I went up to your office to see you about it and you were not in, and I came back to my office and settled with Mr. Collins." Hall said: "Why didn't you settle mine?" Strode said: "I don't know as I had any right according to law," or something like that. Hall says: "Was you not to collect my bill?" and Strode said: "Yes." That is about all I know about it.

## CROSS-EXAMINATION.

I left them talking.

J. S. Lindsey testified:

I was cutting stone for Dr. Hall in front of his house in May, 1884. One evening Mr. Strode came along and Dr.

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Hall v. Strode.

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Hall asked him when he would get that money for him; he said as soon as a levy was made, or something to that effect, but not before, and Dr. Hall asked him if he would get the money as soon as the levy was made; he said he thought at that time he could; they were speaking about a claim against the city or county; this was between the 10th and 14th of May, 1884.

## CROSS-EXAMINATION.

The conversation, as I understand it, was about some money Mr. Strode was to get for Mr. Hall.

## DEFENDANT'S TESTIMONY.

Jesse B. Strode the defendant, testified:

Have been practicing law since November, 1879. In 1882 or 1883, Mr. Collins who testified in this case employed the firm of Smith & Strode to prosecute the case against the city for his wife for damages; we prosecuted the suit and were assisted by Chapman and Beeson.

Q. 357. How long had the firm of Smith & Strode existed at that time?

A. The firm of Smith & Strode commenced business January, 1880, and this suit for Mr. Collins was brought in 1881 or 1882; we had our office in the Fitzgerald block.

Q. 360. I will ask you to state by what means you held yourself out to the world as a firm by what name?

A. We advertised in the papers—I ain't sure whether more than one or not—at least the *Plattsmouth Herald*, and put a sign both at the foot of the stairs and at the door of our office with the name of Smith & Strode, Attorneys at Law, upon it in large letters, which could be read coming up and down street, and the one over the door from any part of the hall and stairway from which it could be seen, also by appearing in court together, prosecuting suits together, signing papers and transacting a general law business in this county.

Q. 361.—You may state whether or not you were doing any law or collection business at that time independent of the firm of Smith & Strode?

A.—All the business was transacted in the name of Smith & Strode, all collections were received and entered upon the collection register of Smith & Strode. As I recollect it I asked Dr. Hall upon the street to make out a bill of his fees coming to him from Mrs. Collins for his treatment of her during the time she was disabled from the injuries she received, and I think that he afterwards came to the office and told me how much it was, but he never gave me an itemized bill. I told him it was not necessary to have one in order to include it in the petition, and it was put in. The bill was never given to me for any other purpose than to be put in this petition to be recovered in the judgment against the city. Nothing was said about my collecting the money for him, but simply that it might be collected in the judgment in addition to the damages from the injuries to Mrs. Collins. I know it was not given to me or the office to collect for the simple reason that it is not on the collection register. The doctor's bill was not recovered in the suit for the reason that the court held that it was a claim in favor of the husband and not the wife. Dr. Hall and I have never had any conversation in regard to my collecting his bill to my recollection. Dr. Hall has three or four times since the judgment was recovered asked me when I thought it would be paid, and I always told him what was being done about it. That is the only kind of conversation I ever had with him about it. The conversation in front of the doctor's house was like this—he said: "Strode, when is that Collins judgment likely to be paid?" I said I did not know just how soon, but the levy had been ordered by the city council, and as soon as the money was collected it would be paid. He said he was hard up and would like to get his money out of it. George Smith and I bought the

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Hall v. Strode.

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judgment and it was assigned to me. The amount due on the judgment was about \$900, one-half of which belonged to Mrs. Collins and the other half to her attorneys as fees. We gave them \$400 for their share. I went to Dr. Hall's office to notify him that the Collins' would probably get the money, but he was not in, and did not see him. The money was not paid to Mrs. Collins till about an hour after I went to the doctor's office.

A.—There was no part of the judgment paid at the time Hall sued me, nor perhaps six months afterwards, or longer. The first was paid after the first of January, 1885.

The conversation in front of Mayer's store was like this: Dr. Hall asked me about this Collins claim; when it was about to be paid; when Collins' would get their money. I told him that Smith and I had bought the judgment, and it was assigned to me. He asked me if I saved out his bill. I told him no, I had no authority to do so. He said, "Did I not put my claim in your hands for collection?" I said, "No, I never had it for any purpose but to put it in the petition." He said I had it for collection. I denied it. That is about all that was said. At the time he gave me the amount of his bill to put in the petition I asked him if it was charged to Jonathan Collins; he said it was; I told him we were bringing the suit in the name of Mrs. Collins, and he suggested that he would change it. I did not know that he changed it.

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CROSS-EXAMINATION.

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Smith and I dissolved partnership in November, '82. The judgment against the city was for \$1,000; Mrs. Collins had about \$100 costs to pay; the judgment drew seven per cent interest, and was recovered in May, '83; Mrs. Collins' share, including interest, was \$475 or \$480. The costs were talked over with Mrs. Collins, but nothing was said about any other expenses; I never said anything to either Mr. or Mrs. Collins about the Doctor's bill; I had

no authority. In the petition we claimed \$125 for medical service and attendance. Dr. Hall's name was not used. After her wrists had been examined, there upon the witness stand, by the doctors and pronounced almost as good as before the wrists were broken, and that it was a good job of surgery. The doctor said to me, I am going to have more than the \$57 I named for my job of setting her arms; it is \$125, and if they get a judgment I am going to have it. On rebuttal Hall denied making the above statements.

Simon D. Mayer testified: Heard conversation between Dr. Hall and Strode in front of my store. Mr. McCauley was present. It was something about a claim against Mrs. Collins. Dr. Hall stated he put the claim into Mr. Strode's hands for collection. Strode said he did not, that is all I know. I did not hear all the conversation.

Byron Clark testified: Was present at conversation in front of Dr. Hall's house; it was like this. The doctor asked Strode when that Collins judgment was to be paid, said he wanted some money out of it on his bill. Strode said a levy had been made and he supposed it would be paid some time next year, when the taxes were collected.

After evidence submitted and argument made, the plaintiff asked the court to instruct the jury as follows:

1. It is the duty of an attorney at law to exercise due diligence in the prosecution of all business entrusted to him, and if you find from the evidence that the plaintiff placed the claim he had against Mrs. Collins in the hands of the defendant for collection, and that the defendant, by using ordinary diligence, could have collected the same, but failed to do so, and plaintiff by reason of such failure lost his claim, then you must find for the plaintiff; which the court modified by adding thereto the following words: "provided she had contracted the debt, and was legally liable therefor," and gave said instruction so modified to the jury, to which modification the plaintiff at the time excepted.

2. When parties to a transaction swear contradictory to



each other you are to take into consideration all the attending circumstances of the case, the situation of the parties, and their relation to the case, their means of knowledge of the particular transaction, their inducements or incentives to know or forget the facts, and their natural tendency to be influenced by their personal interest, and after weighing the evidence in the light of all the attending circumstances, you will decide the case by a fair preponderance of the evidence.

The plaintiff also asked the following:

5. The plaintiff brings this action against the defendant individually. Under the issues thus presented the defendant could not avail himself of the fact—if it is a fact—that at the time plaintiff claims that the cause of action arose, that the defendant was in partnership with some other person who would be jointly liable with him. In order to avail himself of this defense it would be necessary to specially set it up in his answer, and not having done so he has waived it, and cannot now avail himself of that defense, which the court refused to give, to which ruling the plaintiff excepted at the time.

The plaintiff also asked the court to instruct the jury as follows:

6. If you find from the evidence that the defendant undertook to collect the claim of pl'ff, or to make an effort to do so, out of the judgment obtained against the city for Mrs. Collins, and that by the exercise of reasonable diligence he could have done so, but that he failed to collect said claim when he could have done so by asking her to pay it, and that in consequence of said neglect plaintiff lost his claim, then you should find for plaintiff upon this issue such sum as you may find from the evidence that his services were reasonably worth.

Which the court modified as follows: "Provided the said Sarah A. Collins had contracted the debt, and was legally liable therefor," and gave the instruction so modi-

fied to the jury, to which modification the plaintiff excepted at the time.

The defendant requested the court to instruct the jury as follows:

1. The jury are instructed that if they find from the evidence that the claim for medical services in question in this case was not a just and legal claim against Sarah A. Collins, but was a legal debt against her husband, and was not such a debt as could have been legally enforced against Sarah A. Collins, then plaintiff cannot recover in this action, which the court gave, to which ruling the plaintiff excepted at the time.

2. Before you can find for plaintiff in this action you must find from the evidence that defendant received the claim for collection and undertook to collect the same, and that he has been guilty of negligence, and that by reason of such negligence the plaintiff has suffered loss or damage in the failure to collect the claim mentioned.

The court on its own motion instructed the jury as follows:

1. Gentlemen of the jury :

The plaintiff in this action claims of the defendant the sum of \$59, and alleges that about the month of August, 1881, the defendant was an attorney at law and was engaged in the practice of his profession in this county. At about that time plaintiff employed said defendant as such attorney to collect for plaintiff an account which he then put into his hands for that purpose against one Sarah A. Collins for \$59, which said defendant as such attorney received and agreed to collect, for which plaintiff agreed to pay him what his services were reasonably worth; that said account, with due and reasonable diligence, could have been made and collected from the said Sarah A. Collins, but by the inexcusable neglect on the part of the defendant the same has not been collected, and the said Sarah A. Collins is now insolvent, and that said account has become and is

entirely worthless by the reason of the said neglect on the part of the defendant.

The defendant in his answer denies all of the allegations, and it devolves on the plaintiff to establish them by a preponderance of the evidence. The burden as to the counterclaim set out in his answer is upon the defendant.

2. In order to recover in this action plaintiff must have proven by a preponderance of evidence that by an express or implied agreement defendant undertook to collect for him a debt owing to him by Sarah A. Collins, due or to become due, and it must appear from the evidence to have been a legal liability and not merely a moral obligation, a lawful debt and not a mere claim of indebtedness, because if she owed plaintiff nothing, no neglect or failure of defendant to collect for him out of her property or out of the proceeds of any claim or pretended claim which she did not legally owe could in law result in lawful damage to the plaintiff, or create a legal liability on the part of the defendant.

3. The law imposes the duty upon the husband of furnishing necessary medical attendance to the wife, and neither the wife or separate property will be liable therefor, except under and by virtue of an express or implied agreement made with her at the time or before such attendance or services are rendered in which and by which she undertakes to pay therefor.

4. If you find from the evidence that at or about the time the plaintiff rendered the professional services upon which his claim against Sarah A. Collins is based he changed the same on his book to or against her husband, that fact would raise a strong presumption that no such agreement was made or existed between her and plaintiff that she would pay for such services.

5. The judgment in favor of Sarah A. Collins and against the city of Plattsmouth, and which is in evidence in this case, was her separate property, and neither it nor

the proceeds thereof was or is liable for her husband's debt, if any he owed to plaintiff for medical service or attendance furnished, as is claimed by plaintiff, and defendant could not lawfully appropriate the same, or any part thereof which might be in his hands, as her attorney or otherwise, to payment of her husband's debt to plaintiff or to any other person, and failure so to do would not create any legal liability against him.

6. If you find from the evidence that the claim referred to was not a lawful claim, such as is described and defined in instruction No. 2 above, or that defendant was not employed by plaintiff to collect such debt, you need not consider the question of negligence, but you should find for defendant on plaintiff's cause of action.

7. If there was a lawful debt in favor of plaintiff and against Sarah A. Collins, and plaintiff employed defendant to collect it, defendant would be required to use reasonable skill, diligence, and care to collect the same, and if by reason of his failure or neglect to do so plaintiff's debt was lost, the defendant would be liable for the amount which he might have collected on said debt by the use of reasonable diligence and care.

8. In order to recover on his cause of action set up in his answer defendant must have proven by a preponderance of the evidence that the professional and legal services claimed for were performed and rendered by him for plaintiff, and at his instance and request. If you find that such services were so rendered and performed you should allow him what the same were reasonably worth under the evidence, unless you find that at the time of the settlement of the case in which the services were rendered he agreed with plaintiff not to charge him anything. As to such agreement the burden of proof is upon the plaintiff.

The action, it will be observed from an examination of the petition, is not based upon the legal liability of Mrs. Collins to pay the claim, but it is alleged that the defend-

ant was employed by the plaintiff to collect the claim; that he was the attorney for Mrs. Collins, and while said claim was in his possession he recovered a judgment in favor of Mrs. Collins against the city for the sum of \$1,000, and that he had control of the same, and that Mrs. Collins was willing to pay the plaintiff's claim out of said judgment, and that the defendant could have collected the same, but failed to do so; and that by reason of said neglect, and the purchase of the judgment by himself, the plaintiff has sustained the amount of damages claimed. To the allegations thus made the defendant interposes denials. Upon the issues thus made by the pleadings the plaintiff was entitled to have the cause submitted to the jury, but these issues were entirely lost sight of by the court in its instructions to the jury. Thus, in the first instruction asked by the plaintiff, the court placed the right to recover upon the ground that the plaintiff had legally contracted the debt and was legally liable therefor, and this principle runs through all the instructions. How far a defense of this kind would be available it is unnecessary to consider, as the question does not arise.

Such a defense would be available, no doubt, on a failure to collect by legal process, but not in a case like this. Suppose a claim was placed in an attorney's hands for collection, against which the statute of limitations had run, but the debtor, notwithstanding the statute, was willing to pay, and that the attorney holding the claim also had a judgment in his hands in favor of the debtor, out of which the debtor was willing the claim should be paid, could the attorney, upon a failure to ask for or seek to have the claim satisfied, take an assignment of the judgment at a very considerable discount, and thereby prevent the payment of the claim, and afterwards plead the statute of limitations for the debtor as a defense to the action? That he could not will not be seriously questioned; yet, if the plaintiff's statement is correct, his claim rests upon much stronger grounds.

His services were rendered to Mrs Collins to cure the very injuries for which she recovered against the city. It may reasonably be inferred from the testimony that his only expectation of compensation was from the judgment against the city. Both Collins and his wife, probably, were willing to pay, but did not have the means except as obtained from this judgment, and this probably explains the change in the account from Mr. to Mrs. Collins, when the plaintiff was informed that the action was brought in her name.

If the plaintiff's allegations are true, the defense would seem to be the unwillingness of Mrs. Collins to satisfy the claim, and the consequent inability of the defendant to collect it. The plaintiff is entitled to have the issue as made by the pleadings submitted to the jury, and that was not done on the former trial of this case. The court should have given the fifth instruction asked by the plaintiff. The answer consists of denials—practically a general denial. If there was a defect of parties defendant, as the defect did not appear on the face of the petition, it should have been set up by answer; and as this was not done, no proof could be given on that point. It is unnecessary to notice the several instructions in detail, as the case was tried upon a theory not authorized by the pleadings; and as there must be a new trial, we will not comment on the testimony. The judgment of the district court is reversed, and the cause remanded for further proceedings.

**REVERSED AND REMANDED.**

**THE other judges concur.**

**J. OLIVER DENNIS ET AL., APPELLANTS, V. THE OMAHA  
NATIONAL BANK, APPELLEE.**

1. **Revivor of Judgment.** The county court has authority to revive a judgment rendered by it.
2. ———: **JURISDICTION OF COUNTY COURT.** Where the transcript of a judgment rendered in a county court is filed in the district court of the same county, all proceedings should thereafter be held in such district court, but in the absence of a statute prohibiting the court in which the judgment was rendered from proceeding further in the case, a judgment of revivor rendered in such court will not be invalid.
3. **Homestead: CASE STATED.** The wife of one D. possessed a homestead in her own right in the city of O., in this state. In 1877 D., being in embarrassed circumstances, went to the Black Hills to open some mines possessed by him. In the fall of 1878 he returned to this state, and the February following his wife died, leaving a daughter, the child of D., about three years of age. D. then procured a brother-in-law and his wife to move into the house, rent free, and take care of his child, the furniture of D. remaining in the house. D. thereupon returned to the Black Hills, and remained till 1882. While there he exercised the right of suffrage at least once, perhaps three times, but the proof showed that he was there merely for a temporary purpose, and that his actual home was in O., in this state. *Held*, That his right of curtesy in the homestead was not subject to sale on execution—that there was no abandonment of the homestead.

**APPEAL** from the district court of Douglas county.  
**Heard below before NEVILLE, J.**

*George W. Doane*, for appellants.

*Arthur C. Wakeley*, for appellee.

**MAXWELL, CH. J.**

In January, 1875, two judgments were recovered in the county court of Douglas county by the defendant against

19	675
90	314
24	309
19	675
29	318
19	675
37	390
19	675
44	278
19	675
54	219

the plaintiff and the Hall Steam Engine Co., one for \$139.45, and the second for \$129.52, the debt in each case being incurred in 1874. In March, 1879, a transcript of one of the judgments was filed in the district court of Douglas county. In February, 1882, the judgments having become dormant, proceedings to revive the same were instituted in the county court of Douglas county, and the actions revived. Transcripts were thereupon filed in the district court of that county, and executions issued thereon, which were levied on the interest of the plaintiff in lot 2, block 14, in E. B. Smith's addition to the city of Omaha, being his life interest therein as tenant by the courtesy. The plaintiff's interest in said lot was thereafter sold to the defendant under said levy, the sale confirmed, and a deed made to the purchaser. An action of forcible entry and detainer was thereupon brought by the purchaser to obtain possession of the premises, whereupon the plaintiff brought this action to enjoin the prosecution of the said action.

On the trial of the cause the court found the issues in favor of the defendant, and dismissed the action.

The testimony tends to show the following facts: That the lot in question was purchased before the debts on which these judgments were recovered were incurred; that the title to the same was in the name of plaintiff's wife; that a small house was erected on the lot, in which the plaintiff, his wife, and child resided; that the plaintiff was engaged in business in Omaha, but was unfortunate; that about the year 1877 or 1878—the time is not certain—he went to the Black Hills to better his financial condition. He testifies, on cross-examination, "I had some mining interests there, and I thought I could make some money out of them, and went back and tried to do so, as I was embarrassed financially." He returned home the first time in December, 1878. His wife died in the following February. He then procured his brother-in-law, Mr. Viss, and his wife to live in the house in question and take care of his child



during his absence; and in May, 1879, he returned to the Black Hills, where he seems to have remained until 1882, when this action was instituted.

The first objection made by the appellant is that the county court has no authority to revive a judgment. This question was before this court in *Hunter v. Leahy*, 18 Neb., 80, and it was held that the county court, upon proper application, may revive a judgment that has become dormant. And in *Miller v. Curry*, 17 Neb., 321, it was held that the provisions of the code for the revival of judgments apply to actions before justices of the peace. These decisions, in our view, state the law correctly. A court that has authority to render a judgment in the first instance certainly retains the power, where no appeal has been taken, to keep such judgment alive until it is satisfied. The first objection, therefore, is untenable.

2. That a transcript having been filed in the district court, proceedings to revive should have been had in that court. There is great force in the objection of the appellant, and this was the course pursued in *Fox v. Abbott*, 12 Neb., 828. The cause practically having been transferred to the district court, where all the remedies known to the law may be resorted to for the collection of the judgment, it would seem but justice that all proceedings should be had thereafter in that court; but as the statute does not declare that the inferior court is ousted of jurisdiction, we cannot hold that it is, and must therefore hold that the county court had authority to revive the judgments. The second ground of objection, therefore, is not sustained.

3. That the plaintiff had not abandoned his homestead. This, evidently, is the principal question in the case. The right of homestead is governed by the law in force when the debt was incurred. *Dorrington v. Myers*, 11 Neb., 388. *De Witt v. Sewing Machine Co.*, 17 Neb., 538. *McHugh v. Smiley*, Id., 620. The statute in force when this debt was contracted exempted a homestead owned and

occupied by any resident of this state being the head of a family, and declared that the same should be exempt so long as it was owned and occupied by the debtor as such homestead. In case of the death of the debtor the estate in the homestead descended to the heirs at law or legatees, free from all claims of creditors. The testimony shows that the plaintiff left his furniture in the house in controversy. He was a widower financially embarrassed. He went to the Black Hills temporarily, as he testifies, to work his mines, and if possible to better his circumstances. He seems to have engaged in various kinds of business there, and possessed a ranch. We do not understand by this that he had anything more than a squatter's claim on the public lands, as the testimony fails to show anything more than this. Four witnesses testify that he voted in the county in which he resided at least twice up to the year 1882, and that he was registered as a voter. This he denies, except as stated on his cross-examination as follows: "Just before I came away there was a lot of roughs came in there from Montana, and we had several cabins broken open and things taken out; and we had no officers and no way of getting hold of them except going ten or twelve miles, and we set a day for a kind of an election to get a constable and justice of the peace, so that we could get hold of them without going so far, and we had a little election, and I voted there just before I came away in 1882." In regard to the registration he states that the registrar entered his name without his application. There is no doubt of the general rule that the exercise of the elective franchise is conclusive upon the question of residence. That is, that a party who has gone into another state or territory cannot be permitted to deny that he is a resident of the place where at the time he has exercised the right of suffrage. This rule, however, when applied to the homestead, necessarily must be governed by the facts in each case. Thus, suppose the wife of a resident of this state possesses a home

therein, in which the family reside, the husband and father could not by going into another state deprive them of this home without their consent by the mere exercise of the right of suffrage in such other state or territory; and particularly is this true if he went there for a merely temporary purpose. Where the homestead right has once become vested by the party entering into possession and enjoying the same for years, such right, as against a debt incurred after the homestead right was acquired, can be divested only by a sale or abandonment. *Dorrington v. Myers*, 11 Neb., 391. In *Stout v. Rapp*, 17 Neb., 469, it is said: "It is evidently the purpose of the statute of this state, as well as others having similar laws, that the homestead exemption shall not be so much for the benefit of the person standing in the position of the head of the family as for the family itself. This has been the holding of the courts with but few exceptions. See Thompson on Homestead Exemptions, §§ 40 and 41." The abandonment that would subject the homestead to sale would be total, without any occupancy under claim of homestead. Now suppose that a wife and family are in possession of a homestead under the statute of 1867, and that the husband and father has removed to another state, the homestead would still be exempt, because, in fact, it was the home of the wife and family. So if the wife should die, but the family should continue to reside therein, it would still partake of the homestead character, and would be exempt. Cases, no doubt, may be found in some of the older states where a narrow construction has been given to the statute, and its beneficent objects in many cases defeated. The statute being remedial in its nature is to receive a liberal construction, so far as may be consistent with good faith to creditors, to carry it into effect. If the homestead was exempt when the debt was contracted, then no reliance could have been placed by the creditor on that property for the satisfaction of his claim. So long, therefore, as the homestead

is used as such it continues a homestead. In the case at bar the wife being dead, and the father of the only child in embarrassed circumstances, he procured his deceased wife's sister and her husband to move into his house, rent free, and take care of his child. The plaintiff's furniture was left in the house. The arrangement for the care of his daughter evidently was temporary in its nature, as he was hoping and expecting to better his fortune in the Black Hills, and then return to Omaha. That he regarded as his home, and it certainly was the home of his daughter, the only home that she had ever had. There was no such abandonment of the homestead, therefore, as would subject it to sale upon execution; and being occupied as a homestead when the sale took place it does not in any manner affect the homestead right. *McHugh v. Smiley*, 17 Neb., 620-626. The defendant, therefore, acquired no interest in the premises by the purchase of the plaintiff's right of curtesy. It follows that the judgment of the district court must be reversed, and judgment will be entered in this court making the injunction perpetual. We have not discussed the question whether the property in question descended to the daughter upon the death of her mother, free from the claim of curtesy on the part of the plaintiff, for the reason that it is not presented in an issuable form and is immaterial in the case.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOSEPH LAMB, PLAINTIFF IN ERROR, v. BETSY  
SHERMAN, DEFENDANT IN ERROR.

1. **Judgment: LIEN.** A judgment was rendered in the county court of J. county, and a transcript thereof filed in the district court of said county, and a duly certified transcript from the district court of J. county was filed in the district court of T. county Feb. 19, 1876. In January, 1878, the debtor and his wife conveyed their real estate in T. county to one S., the deed being acknowledged and recorded May 6th, 1878. *Held*, That the real estate was subject to the lien of the judgment.
2. **Judicial Sale: CONFIRMATION: DEED.** A purchaser at execution sale of real estate, upon the payment of the purchase money and confirmation of the sale, becomes the equitable owner of the property, and in a proper case may compel the issuing of a sheriff's deed to himself.
3. ———: **DEED.** Imperfect recitals in a sheriff's deed of the facts required by section 500 of the code do not render the deed void.
4. ———: ———. The power of the court to compel the issuing of a proper deed to a purchaser at execution sale is a continuing one, and is not exhausted by the issue of a defective deed.
5. ———: ———: A sheriff's deed for lands sold upon execution relates back to the time such lands become liable to the satisfaction of the judgment.

ERROR to the district court for Thayer county. Tried below before MORRIS, J.

*O. H. and A. R. Scott*, for plaintiff in error.

*Griggs & Rinaker* and *Colby, Hazlett & Bates*, for defendant in error.

MAXWELL, CH. J.

This is an action of ejectment brought by the defendant in error against the plaintiff in the district court of Thayer county to recover the possession of the east half of the south-

19	681
40	437
19	681
52	497
19	681
50	50

west quarter of section twenty-one, in township one north, of range one west. On the trial of the cause the jury returned a verdict in favor of the defendant in error, on which judgment was rendered. The plaintiff below, to prove her title to the premises, introduced in evidence a certificate of the register of the land office at Beatrice to Daniel Sherman, dated May 8, 1874, for the land in question; also a patent from the United States to Daniel Sherman for said land, dated August 1st, 1874; also a deed from Daniel Sherman and Betsy Sherman, husband and wife, to Edwin D. Sherman, dated Jan. 2d, 1878, but acknowledged and recorded May 6th, 1878; also a deed from Edwin D. Sherman to Betsy Sherman, the defendant in error, dated October 9th, 1879. The plaintiff in error then offered in evidence a sheriff's deed for said premises, as follows:

"Know all men by these presents: That, whereas, at the December term, A.D. 1875, of the probate court within and for Jefferson county, in the state of Nebraska, J. V. Switzer recovered a judgment against Daniel Sherman for the sum of sixty and fifty-one-hundredths dollars and costs of suit, taxed at two and ten-one-hundredths dollars. And whereupon, by virtue of an execution issued by M. M. House, the clerk of the district court within and for Thayer county, Nebraska, and under the seal thereof, bearing date the 25th day of April, A.D. 1878, and directed to the sheriff of Thayer county, Nebraska, commanding him to cause to be levied of the goods and chattels, and for want thereof on the lands and tenements of the said Daniel Sherman, defendant, sufficient to satisfy the said J. V. Switzer, plaintiff, his judgments and costs as aforesaid, together with interest on said judgment from the 5th day of December, A.D. 1875, and all accruing costs; the sheriff as aforesaid did on the 29th day of April, A.D. 1878, for want of goods and chattels, levy on and seize the following lands and tenements of the said Daniel Sherman, defendant, to-wit:

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Lamb v. Sherman.

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“The east half ( $\frac{1}{2}$ ) of south-west quarter ( $\frac{1}{4}$ ) of section 21, in township one (1) north, of range one (1) west, in Thayer county.

“And, whereas, the said sheriff as aforesaid, under and by virtue of said execution, did on the 4th day of June, A.D. 1878, at the east front door of the court-house, in said county of Thayer, that being the place where the last term of the said district court was held, having first summoned two disinterested freeholders, residents of said Thayer county, and having administered to them an oath impartially to appraise said lands and tenements upon actual view thereof, and said sheriff, together with said freeholders, having made an appraisement in writing of said lands and tenements, and having first given due and legal notice of the time and place of said sale, for not less than thirty days prior thereto in the Thayer County *Sentinel*, a newspaper printed and in general circulation in said county of Thayer, sell the said lands and tenements at public auction to Joseph Lamb for the sum of four hundred and thirty dollars, he being the highest bidder therefor, and the said last mentioned sum being not less than two-thirds of the appraised value thereof. Which sale afterwards, at the May term of said district court, A.D. 1879, was examined and confirmed by said court; and the said W. D. Galbraith, sheriff of said Thayer county, ordered by said court to make a deed of said lands and tenements to the said Joseph Lamb.

“Now therefore, I, the said W. D. Galbraith, sheriff of the said county of Thayer, as aforesaid, in consideration of the premises, and in virtue of powers vested in me by law, do hereby give, grant, and convey to the said Joseph Lamb, his heirs and assigns, all the estate, right, title, and interest in and to the lands and tenements sold as aforesaid, of which the said Daniel Sherman, defendant, was seized and possessed on the 20th day of April, 1878, or any time thereafter, to the east half ( $\frac{1}{2}$ ) of the south-west

Lamb v. Sherman.

quarter ( $\frac{1}{4}$ ) of section twenty-one (21), township one (1) north, of range one (1) west, with all appurtenances there-to belonging, to have and to hold the same to the said Joseph Lamb, his heirs and assigns, and to them and their use and behoof forever.

"In testimony whereof I have hereunto set my hand this 23d day of May, A.D. 1879.

"W. D. GALBRAITH,

"Executed in presence of

"*Sheriff.*

"BYRON M. YOUNG,

"M. M. HOUSE."

"STATE OF NEBRASKA, } ss.  
Thayer County.

"On this 23d day of May, A.D. 1879, before me, M. M. House, clerk of the district court held within and for said county, personally appeared W. D. Galbraith, sheriff of said county, to me well known to be the identical person described in, and who executed the foregoing instrument of conveyance, and who acknowledged said instrument to be his voluntary act and deed as said sheriff, for the use and purpose therein mentioned. In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 23d day of May, A.D. 1879.

"M. M. HOUSE,

"*Clerk of the District Court, Thayer County, Nebraska.*"

{ SEAL OF THE  
DISTRICT COURT  
NEBRASKA,  
THAYER COUNTY. }

ENDORSED

"Sheriff's Deed. W. D. Galbraith, sheriff, to Joseph Lamb. Dated May 23d, 1879.

"STATE OF NEBRASKA, } ss.  
Thayer County.

"Filed for record this 23d day of May, A.D. 1879, at 1 o'clock P.M., and recorded in the office of the clerk of



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Lamb v. Sherman.

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said county in book 'G' of deeds on page 469. Entered on Numerical Index.

"M. M. HOUSE,

"H. E. GARZEE,

"Clerk.

"Deputy."

This deed was objected to for the reason that it was immaterial, irrelevant, and incompetent. The objections were sustained and the deed excluded. The plaintiff in error thereupon offered in evidence the transcript of a judgment rendered in the county court of Jefferson county in an action wherein J. V. Switzer was plaintiff and Daniel Sherman defendant, dated December 3d, 1875, the judgment being for \$60 and costs; also a certificate of the clerk of the district court of Jefferson county, showing said transcript to have been filed in said court on the 18th of February, 1876; also the following referring to the transcript: "Filed in the office of the clerk of the district court in and for Thayer county, Nebraska, on the 19th day of February, A.D. 1876. M. M. House, Clerk."

Objection was made to this transcript as being immaterial, irrelevant, and incompetent. The objections were sustained and the transcript excluded. The plaintiff in error thereupon offered in evidence an execution issued on the transcript above referred to by the clerk of the district court of Thayer county, dated April 25th, 1878, under which the premises in question were sold, and the sheriff's return to the same, whereby it appears that the premises were sold to the plaintiff in error for the sum of \$430; also the confirmation of the sale, order to make a deed to the purchaser, and distribution of the proceeds of the sale. These were objected to as being immaterial, irrelevant, and incompetent. The objections were sustained and the evidence excluded. The plaintiff in error then offered to prove that the debt under which the sale took place was contracted in December, 1874, and after the patent was issued to Sherman. This was objected to, and the objec-

tion sustained. The plaintiff in error offered to prove that Daniel Sherman did not reside on the land in question from September to December, 1874, 1875, and to the year 1876. This was objected to and excluded. There was a large amount of other testimony offered and excluded, to which we need not refer. The court then directed the jury to return a verdict in favor of the defendant in error, which was done, and judgment rendered thereon.

It will be seen that the judgment under which the plaintiff in error claims title became a lien on the land in question on the 19th of February, 1876; that an execution was duly issued thereon, under which a sale of the land in question took place. The sale confirmed a deed ordered and the surplus distributed among the creditors of Sherman, yet all of these proceedings were held by the court below not to affect the title of the defendant in error, although the deed of Daniel Sherman and wife to Edwin D. Sherman, under which she claims title was acknowledged and recorded and presumably delivered May 6th, 1878; but even if it related back to the time it was dated, viz., January 2d, 1878, still the land would be subject to the lien of the judgment.

3 } Sec. 561 of the code provides that "in all cases in which judgment shall be rendered by a justice of the peace the party in whose favor the judgment shall be rendered may file a transcript of such judgment in the office of the clerk of the district court in the county in which the judgment was rendered, and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the execution docket, together with the amount of the judgment, and the time of filing the transcript."

Sec. 562 provides for a lien on the real estate of the debtor. Section 563 provides that the clerk of the district court may issue execution, etc., on the judgment. Section 429a provides that the transcript of a judgment of any district court in this state may be filed in the office of the

clerk of the district court in any county, and be a lien on the real estate of the debtor in like manner as in the county where the judgment was rendered, and that execution may be issued thereon, etc.

Section 18 of chapter 20, Comp. St., provides that "any person having a judgment rendered by a probate court may cause a transcript to be filed in the office of the clerk of the district court in any county of this state, and when such transcript is so filed and entered upon the judgment record, such judgment shall be a lien on real estate in the county where the same is filed," etc. See *Cabon v. Gruenig*, 18 Neb., 562.

Sec. 2 of the same chapter provides that "the provisions of the code of civil procedure relative to justices of the peace shall, where there are no special provisions to the contrary, apply to county courts."

Sec. 498 of the code provides for the confirmation of all sales of real estate, whether sold upon execution or order of sale.

In *State Bank v. Green*, 10 Neb., 134, 135, it is said: "Under our statute governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not certainly divested. *Miller v. Hall*, 1 Bush (Ky.), 230."

Under our code a purchaser of real estate at execution sale, who has paid the purchase price, and the sale has been confirmed, is the equitable owner of the property, and may compel the officer, if need be, to execute a deed therefor. Our statute was designed to protect the debtor by requiring an appraisement of the property, and that it bring at least two-thirds of the appraised value, and the purchaser by transferring to him the title of the debtor. Therefore, where the court has jurisdiction, its proceedings in confirming a sale are not subject to attack collaterally.

Sec. 500 of the code provides that "the deed shall be sufficient evidence of the legality of such sale and the proceedings thereunder until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment. And such deed of conveyance to be made by the sheriff or other officer shall recite the execution or executions, or the substance thereof, the names of the parties, the amount, and date of term of rendition of judgment by virtue whereof the said lands and tenements were sold as aforesaid, etc.

It will be observed that there is no recital in the deed that the transcript of the judgment was filed in the district court of Thayer county, but the filing is to be inferred from the fact that the clerk of said court issued execution on the transcript, and is clearly proved. The object of requiring the recital of the date of the judgment, no doubt, was for the purpose of showing on the face of the deed from what time the lien became operative, and in a contest between lienholders or persons claiming to be *bona fide* purchasers it might become material.

But if one or more of the statements required by the statute had been omitted from the deed the power of the court to protect the purchaser, being a continuing one, it could require the sheriff to execute a new deed to conform to the statute, and this power should be exercised in a proper case.

The deed in this case purports to convey the title possessed by Daniel Sherman on the 25th of April, 1878, and does not relate back to the date of the lien of the judgment as it should do. But even then it appears to have transferred the title of Daniel Sherman to the plaintiff in error. The record shows that the deed from Daniel Sherman and wife to Edwin Sherman was acknowledged and presumably delivered May 6th, 1878, after the levy

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 Murphy v. Lyons.
 

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of the execution. In the case at bar there is not an entire omission to state in the deed all the facts required by the statute, but they are not stated as fully as they should be. The deed, therefore, should have been received in evidence. As there must be a new trial the district court should permit an examination of the facts under which the plaintiff in error claims the possession of the land in controversy. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19	689
36	759

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WILLIAM MURPHY, PLAINTIFF IN ERROR, V. JOHN  
LYONS, DEFENDANT IN ERROR.

1. **Summons: SERVICE BY PUBLICATION.** Before service of notice of the pendency of an action against a defendant can be made by publication in a newspaper an affidavit must be filed with the clerk of the court in which the action is pending, setting forth that service of the summons cannot be made in the state on the defendant to be served, and that the cause is one of those mentioned in section 77 of the civil code.
2. **Jurisdiction:** The decrees and judgments of a court of general jurisdiction and power are presumed to have been made in causes in which the court had jurisdiction until the contrary is proved. But if it is shown by the record that the court had not acquired jurisdiction over the subject matter or person, such judgment or decree is void, and will be so treated in a proceeding either direct or collateral.
3. **Evidence: LOST PAPER.** Before secondary evidence is admissible to prove the existence or contents of a paper claimed to have been attached to and a part of the files of a case in court it must appear that diligent search has been made in the proper office for such paper, and that it is lost or destroyed and cannot be found.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

*N. C. Abbott*, for plaintiff in error.

*L. C. Burr and Lamb, Ricketts & Wilson*, for defendant in error.

REESE, J.

This was an action of ejectment, instituted in the district court by plaintiff in error, by which he sought to recover the possession of the real estate in dispute.

Defendant answered, alleging ownership, basing his title upon two certain deeds, one of which was made by the sheriff upon order of sale in an attachment proceeding against plaintiff, and the other by a master commissioner in a foreclosure of mortgage against plaintiff. The reply of plaintiff attacked both of those proceedings and alleged that the court rendering the judgment in attachment and the decree of foreclosure was without jurisdiction and that the proceedings in both cases were void for want of such jurisdiction.

The principal allegation and point of attack is that in the attachment suit of J. B. Price against plaintiff, in which no other service was had than by publication of notice, the affidavit of non-residence was not filed in the office of the clerk of said court until after the first publication of the notice, and that the notice as published fixed the answer day on the fifth Monday after publication instead of the third, as required by section 110 of the civil code. It is also claimed that no affidavit of non-residence was made in the foreclosure suit, that no other service was had than by publication, and that for want of such affidavit the whole proceeding was void. Plaintiff did not appear in either of said actions. Upon the trial of this case the

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Murphy v. Lyons.

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records and files of the district court in both cases were received in evidence over the objection of plaintiff, and, judgment being rendered against him, he alleges error in this court, assigning as such the admission of the deeds, pleadings, and records in those cases.

The questions here presented are as to the jurisdiction of the district court in the actions which culminated in the two deeds admitted in evidence. It is insisted by defendant in error that those judgments cannot be attacked collaterally, as plaintiff seeks to do; that every presumption is in their favor, and that the trial court did not err in admitting the deeds in evidence and rendering judgment in favor of defendant. It is true that the presumptions are in favor of the jurisdiction of the district court and that it had authority to render the judgments which form the basis of the deeds by virtue of which the defendant claims title to the land in question. We take it to be well settled that the judgments of courts of general jurisdiction are supported by the presumption not only that they had jurisdiction to render such judgments as may appear upon their records as having been rendered by them, but also every presumption must be indulged in all things necessary to such jurisdiction, and that they are not liable to a collateral attack for irregularities in the exercise of the jurisdiction which is presumed to exist. But it is competent for one seeking to avoid the force of a judgment of a court of general jurisdiction to attack such judgment for want of jurisdiction even in a collateral proceeding. *McGavock v. Pollack*, 13 Neb., 535. *Boker v. Chapline*, 12 Iowa, 204. For if the court had no jurisdiction to render the judgment or decree it is void and is no judgment. The rule is that jurisdiction is to be presumed until the contrary is proved. Wells on Jurisdiction of Courts, chap. 6.

On the trial of this case in the district court the defendant offered in evidence the judgment of the district court

of Lancaster county in the suit of J. B. Price against this plaintiff, together with the files of the case. This was objected to because the affidavit of the non-residence of plaintiff (defendant in that action) was not filed until after the publication of notice was made, as appeared affirmatively upon an inspection of the papers and record in the case, and that therefore the court had acquired no jurisdiction. The objection was overruled and the evidence admitted. This record shows that the petition and affidavit for attachment were filed in the office of the clerk of the district court on the 18th day of December, 1879. On the 20th day of the same month the first publication of notice was made, and on the 22d the affidavit of the non-residence of the defendant in that action was filed. Section 78 of the civil code provides that "before service can be made by publication an affidavit must be filed that service of summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication."

The filing of this affidavit has been held to be a jurisdictional matter in *Blair v. West Point Manufacturing Company*, 7 Neb., 146. *Atkins v. Atkins*, 9 Id., 191. *Frazier v. Miles*, 10 Id., 109. *McGavock v. Pollack*, *supra*.

In *Frazier v. Miles*, it is said that "Where service of summons cannot be had upon a defendant in this state and it is necessary to obtain service by publication, it must appear that the steps required by the statute have been taken to obtain such service."

It is very apparent that no affidavit of the non-residence of plaintiff was on file at the time the first publication of notice was made, and it would seem equally clear that such publication, being wholly without authority, was void, and would give the court no jurisdiction. The language of the statute is, "Before service can be made by publication an



affidavit must be filed," etc. Again, in the same section it is said, "*When such affidavit is filed* the party may proceed to make service by publication." This clearly indicates the object of the affidavit. Its subsequent filing could not cure the defect.

The want of jurisdiction affirmatively appearing upon the face of the records and files of the case, the court erred in admitting them in evidence.

Defendant also bases his right to the possession of the property in question upon a commissioner's deed, and certain proceedings leading up to it, in the foreclosure of a mortgage on the land in question, wherein Catherine F. Stimpson was plaintiff, and this plaintiff (Murphy) was defendant, and in which case a decree of foreclosure was entered by the district court of Lancaster county. The deed, records, and proceedings in the case were offered in evidence and admitted over the objection of plaintiff in error. In that case, also, service was made by publication. No affidavit of the non-residence of Murphy was among the files nor recorded in the complete record, and no reference to any such paper was made by any entry in the appearance docket.

The objection made to the introduction of this evidence was based upon the ground that it appeared thereby that no affidavit of non-residence was ever filed, and that therefore the court rendering the decree was without jurisdiction. If no affidavit ever *was* filed it is clear that the decree would be void—*McGavock v. Pollack, supra*—no appearance having been made, and no other service than by publication being had. The defendant seems not to have rested upon the presumption in favor of the decree against Murphy, but introduced all the files of the case—the affidavit of non-residence excepted—as well as the entries in the appearance docket. These were admitted over the objections of defendant, but afterwards the attorney who prosecuted the foreclosure suit was placed on the witness stand

for the purpose of showing by him that the affidavit was actually made and filed. This testimony was objected to, and the objection overruled and the testimony taken. The clerk was afterwards placed upon the stand for the purpose of showing that he had searched for the missing paper, but that it could not be found.

Assuming that it was competent to prove the loss of this paper, or rather that it could not be found in the office, and the further fact that such a paper had been actually filed and was at one time among the records, we think the testimony of the clerk fell far short of laying the foundation for secondary proof of the existence of the paper and of its contents. His testimony was, substantially, that his attention had not been called to the matter until the day of trial, and that he had made no examination in his office except among the papers in the case and upon the appearance docket. It was shown that the papers and files were originally very loosely attached together. The probability that some of them might have become detached was very great, even before they were entered upon the appearance docket and complete record, yet no effort was made to find the missing paper. For aught that was shown the affidavit might have been found in a few minutes' search. At least, as much diligence should have been shown in endeavoring to find the missing paper as would have been necessary to find a contract or other writing, before secondary proof could be made. Such proof was wholly inadmissible until after this showing of diligence. *Birdsall v. Carter*, 5 Neb., 517.

The judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM H. RIED, PLAINTIFF IN ERROR, V. THE  
STATE OF NEBRASKA, DEFENDANT IN ERROR.

**Witness Fees.** The fees of a witness from another state, coming into this state in obedience to a subpoena issued on behalf of the state in a prosecution for a felony, and where the testimony of such witness is material and necessary, are taxable to a defendant where the prosecution results in a conviction of the defendant of the crime for the commission of which the prosecution was instituted.

ERROR to the district court for Gage county. Heard below before BROADY, J.

*L. W. Colby and Hazlett & Bates*, for plaintiff in error.

*William Leese, Attorney General*, for the state.

REESE, J.

It is agreed by counsel that there is but one question presented in this case, and that is, whether the state is entitled to a judgment against a defendant, convicted of a felony, for the cost of witnesses necessarily brought or who accept service of subpoena and come from another state. The question of the materiality of the testimony or the necessity of bringing witnesses from a long distance is always for the trial court; and while a party securing the attendance of a witness from a long or short distance must always pay the legal fees therefor, yet, for the protection of litigants and defendants in state cases, it is the province of the court in proper cases to refuse to tax such costs to the losing party.

The question here is, not whether the witnesses are entitled to their fees—for they clearly are—from the party calling them. Any other holding would be a suggestion of the practice of a species of bad faith, which the courts

would not for a moment sanction. In the case at bar the state officer sent subpoenas to the witnesses in Iowa, and upon his request the witnesses accepted service and came in obedience to the requirements thereof. The state, or rather that part of it represented by the county where the crime is alleged to have been committed, must pay them their full fees for the whole distance "necessarily traveled." Sec. 23, chap. 28, Compiled Statutes, 1885.

Assuming, as we must, that these witnesses were necessary and that their testimony was material, as these facts are not questioned, we are of the unanimous opinion that the state is entitled to the taxation of these costs. Without inquiring what the rule might be in a civil case where depositions might be taken, it is clear that the only method by which the testimony might have been used on the part of the state under the provisions of the constitution, would be by the production of the witnesses in court. While the state might not be able to compel their attendance, yet if they saw fit to yield obedience to its request in the form of a subpoena, we can see no possible reason why they should not be treated as any other witness, and their fees, necessarily paid by the state, taxed accordingly. *Hutchins v. The State*, 8 Mo., 288.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. H. G. MECHLENY,  
v. HENRY C. JAYNES.

**Costs in Mandamus Cases.** Judgments for costs in mandamus cases can only be collected by execution in the same way as other judgments. A respondent failing to pay such judgment is not in contempt and cannot be proceeded against therefor.

REESE, J.

This cause was originally submitted upon an application for a writ of mandamus. The writ was allowed and an opinion written, which is reported *ante* p. 161.

Relator now files an information seeking to institute proceedings against respondent for contempt of court in not paying the costs of the mandamus proceeding. It is urged that the judgment of the court was that respondent perform the official duties imposed by law, the performance of which was sought to be coerced, and that he pay the costs taxed at \$9.80. That the performance of a *part* of the judgment, viz., the performance of the official duty, can be coerced by proceedings as for contempt, and that therefore the whole of the judgment may be enforced by the same method.

The law provides a method for the enforcement of the payment of money judgments, and that method is the issuance of an execution. We know of no distinction between judgment for costs in mandamus and other cases.

The motion for the institution of proceedings for contempt is therefore denied.

JUDGMENT ACCORDINGLY.

The other judges concur.

19	698
80	264
80	265
19	698
43	270

JOHN MATTIS, PLAINTIFF IN ERROR, v. JOHN W. BOGGS,  
DEFENDANT IN ERROR.

1. **Ejectment.** In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title.
2. ———: **PARTIES.** Tenants in common may join in an action for the possession of real estate held by one without title, or they may sue severally and recover according to their several interests.

ERROR to the district court for Washington county.  
Tried below before NEVILE, J.

*C. A. Baldwin* and *J. J. O'Connor*, for plaintiff in error.

*W. J. Connell*, for defendant in error.

REESE, J.

This cause was originally submitted without brief or argument by counsel for either side, and upon a voluminous record. The court, upon examination of the case without the assistance of counsel, overruled the decision in the case of *Crook v. Vandervoort*, 13 Neb., 505, and rendered judgment reversing the case. The opinion was written and filed, and was published in 25 N. W. Rep., 616. A motion for a rehearing was then made, in which the attention of the court was called to the oversight, when the opinion was withdrawn from the files and a rehearing granted.\* The cause is now submitted, as it should have been in the first instance, upon arguments and briefs.

The action was in the nature of ejectment, brought by defendant in error for the possession of certain real estate described in the pleadings. The land in dispute was patented by the United States to Catherine W. E. Perry. On

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\* Withheld from publication in the official reports.

the second day of September, 1859, she conveyed it to Russell Miller, who died intestate in the year 1863, leaving surviving him as his heirs at law James R. Adams and John W. Adams, sons of Rhoda Ann, eldest daughter of said Russell Miller, who was then deceased; Camelia Matilda, who was married to John Lyons; Sarah Jane, who was married to William Dowling, and Mary Elizabeth, who was married to William G. Robins.

The principal question involved in the case arises upon the third instruction given to the jury by the court, which is as follows:

"The jury are instructed that so far as the interest of John Williams Adams, which would descend to him upon the death of his mother, and which would be one-eighth of whatever interest may have been vested in the heirs of Russell Miller, is concerned, that the failure of plaintiff to make proof that such interest had been conveyed to him by said John Williams Adams, if living, or by his legal representatives or heirs at law, if deceased, does not prevent the plaintiff from recovering in this action the possession of the said real estate. But if the jury find from the evidence and under the instructions of the court that said plaintiff would be entitled to recover possession of the real estate herein, had said one-eighth interest been conveyed to him, then it would be proper to return your verdict for said plaintiff for said possession, so far as the defendant in this action is concerned, for the reason that whoever may be lawfully seized of the interest of the said John Williams Adams would be a co-tenant, or tenant in common, with said plaintiff to the extent of such interest and as against a stranger to the title of said heirs of Russell Miller, and the parties claiming under them, the plaintiff may recover."

The question presented by plaintiff in error is, whether the plaintiff in an action of ejectment can allege in his petition the full fee simple title to the real estate in con-

troversy, and recover the possession of all upon proof of an undivided interest; or, as in this case, upon proof of title to seven-eighths of the land.

The exact question presented here did not arise in *Crook v. Vandervoort*, *supra*. In that case, quoting from the first paragraph of the syllabus, it is said that, "In ejectment by a tenant in common against a mere disseizor to recover possession of undivided premises, he may maintain the action in his own name, if no objection is made for a defect of parties. As the recovery of possession inures to the benefit of all, a failure to plead a defect of parties plaintiff is a waiver of that objection." There is nothing in the opinion by which we can ascertain the condition of the pleadings, but from its language it may be inferred that the plaintiff declared upon the interest which he had, and demanded the whole; hence, as there said by Judge Maxwell, if the defect of parties plaintiff was not objected to, it would not defeat a recovery. In the case at bar the petition did not disclose the defect, if any existed; as it was alleged that plaintiff (defendant in error) owned the whole title, and was therefore entitled to the possession of all the land. The discrepancy between the petition and the facts did not appear until the introduction of the testimony, and hence no objection could be made until that time, as the interest of John Williams Adams seems not to have been known of until during the trial, or about that time. But objection was made at an early stage in the case and the question was presented at the trial court, and is insisted on here.

It is said that ejectment is simply a possessory action; that it does not purport or attempt to settle the equitable rights of litigants; that the possession of one tenant in common is the possession of all, and that therefore the holder of an interest in or of the legal title to a part of the land—undivided—should in ejectment be permitted to recover the possession of the property as against one in possession without right.



Whatever the common law rule may have been as to the joinder of parties plaintiff in actions of this and similar kinds, we take it as well settled by our statutes that tenants in common may join as plaintiffs in an action against a mere trespasser in possession, or one in possession without right. Section 29 of the civil code provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section thirty-two."

Section 40 is as follows: "All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title."

Section 42 is as follows: "Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants, but if the consent of one who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason being stated in the petition."

By these sections and others to which we need not now refer it is evident that it was the purpose of the legislature to so simplify the procedure in our state for the enforcement of legal rights as to enable every person to assert his right to relief without reference to the actions of others so long as he was the *real party* entitled to the enforcement of the right. If others equally interested with him saw fit to join they might do so or not, but if they were *necessary* parties and refused to join as plaintiffs, they could not thus defeat the action, but might be made defendants.

In Bliss on Code Pleading, in discussing the subject of "Parties to Actions" in real and mixed actions, it is said, "In those states where the old action of ejectment has been abolished and the new procedure has not been adopted, it may be doubted whether tenants in common should be permitted to unite in a real action, inasmuch as their title and their interest is several. The new code of procedure, however, provides that 'all persons having an interest in

the subject of the action, and in obtaining the relief demanded, *may* be joined as plaintiffs, except as otherwise provided,' etc. This is the rule that prevailed in equity pleadings, but it is now made general, and applies as well to actions formerly called legal. Notwithstanding the title of tenants in common is several, they have an interest in 'the subject of the action'—that is, in the property in respect to which the action is brought—and in 'obtaining the relief demanded,' provided the disposition applies to all. If the occupant holds adversely to all the tenants in common, and they all join to recover possession, the pleading should show the interest of each, that the judgment may conform to it. The section of the statute just considered is permissive only. Parties are not required to join as plaintiffs unless they are 'united in interest'—that is, have a joint interest—and, consequently, tenants in common may sue severally at their option, each for his own interest. It would seem, however, in the absence of statutory authority, that they must all join for the whole tract, or each must sue for his individual interest. The New York Revised Statutes, which authorized tenants in common to bring one or several actions, did not authorize two or more owners less than the whole to unite in an action. This, however, is permitted by the statutes of Missouri, of California, and of Nevada." Sec. 25.

We have thus copied at some length from the work before us, as an apt expression of our views upon the meaning of the sections of our code. By it, as we understand its language, a tenant in common with others, either by himself or with all his cotenants, may bring and maintain an action against a trespasser upon his real estate for the possession of so much thereof as he may show himself entitled to, and upon the establishment of his claim to the property he may have judgment for so much only as he can show his interest to be, and that therefore the trial court erred in giving the instruction complained of.

We are aware that this is to some extent in conflict with the reasoning of Judge Maxwell in *Crook v. Vandervoort*, *supra*, but we think not in conflict with the *decision* in that case. For it is clearly intimated that had the proper objection been made in time the holding might have been different.

The view here expressed by us is supported by the following cases which we have examined: *Cruger v. McLaury*, 41 N. Y., 219. *Dewey v. Brown*, 2 Pick., 387. *Gray v. Givens*, 26 Mo., 291. *Dawson v. Mills*, 32 Pa. St., 302.

We have examined many, if not all, of the cases cited by defendant in error, and find many of them either dissimilar to this or based upon a statute different from ours.

The cases of *Rabe v. Fyler*, 10 Smedes & M., 446, *Allen v. Gibson*, 4 Rand., 468, were for forcible entry and detainer; but in *Allen v. Gibson*, the court says: "In a writ of right and other real actions the mere right is involved and the proceeding and recovery must be according to the title, and in ejectment nothing can be recovered but that for which the lessor of the plaintiff can make a valid lease. One joint tenant, copartner, or tenant in common, although he has the right to the possession of the whole against strangers, cannot make a valid lease for more than his own part of the land, and therefore no more can be recovered in ejectment than the part to which the lessor,—who is a joint tenant—tenant in common, or partner is entitled."

The cases cited from California and Nevada, as we have seen, are based upon the peculiar statute of those states. *Dolph v. Barney*, 5 Ore., 191, holds with the defendant in error, but cites 4 Nev. and 21 Cal. *Hardy v. Johnson*, 1 Wall. (U. S.), 371, simply holds that the law is settled in California, from whence the case came, and decides according to the decisions in that state. The cases cited from Connecticut seem to follow *Barrett v. French*, 1

Conn., 364, and *Bush v. Bradley*, 4 Day, 298, which were no doubt decided prior to the enactment of any statute similar to the provision of our code referred to. The decisions in Texas and Vermont support the views contended for by defendant in error, but whether or not they depend upon the language of the statutes of those states we are unable to say.

It would seem that no other rule than the one here adopted could accord with the principles of the code, and that it is founded on reason and the principles of common justice. We therefore hold that in an action for the possession of real property a plaintiff must recover on the strength of his title, and is entitled to recover only according to his title proved on the trial.

It is suggested by defendant in error that the defect in his title has been corrected and a deed made to him for the interest of John Williams Adams, and that defendant in error is now the owner of all the land in dispute. This title having been acquired since the filing of the original petition the facts can be alleged in a supplemental petition if defendant so desire, and he may then be entitled to the possession of all of the land.

The judgment of the district court will be reversed and remanded for further proceedings, with direction to the district court that if defendant in error so desire he may, upon payment of the costs of the suit to that time, file a supplemental petition stating the facts as to the conveyance to him of said interest in the land.

REVERSED AND REMANDED.

THE other judges concur.

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 Shuman v. Willets.
 

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J. M. SHUMAN, APPELLANT, v. C. R. WILLETTTS ET AL.,  
APPELLEES.

19	705
26	675
19	705
26	667

**Practice in Supreme Court.** Cause remanded to district court, with directions to ascertain the value of permanent improvements.

FURTHER consideration of case reported in 17 Neb., 478.

REESE, J.

This case was decided upon the merits, and is reported in 17 Neb., 478. Prior to the appeal, and while the decree of the district court in favor of defendant was in force, the frame buildings on the real estate in question, and which are referred to in the opinion, were destroyed by fire. In their stead a brick building was constructed by the grantees of defendant. This building appears to have been built in good faith by the occupants, who relied upon the decree of the district court. They now seek compensation for these improvements. As these improvements are firmly attached to the land and have become a part thereof, and were put thereon in good faith, under circumstances which it is not necessary here to discuss, we think every principle of equity would require that this compensation be made.

The cause will be remanded to the district court, with directions to proceed to ascertain the value of the permanent improvements made prior to the date of the decree in this court, in accordance with the provisions of chapter 63, Comp. St., 1885, and certify their proceedings to this court.

ORDER ACCORDINGLY.

19	706
21	466
19	706
28	845
19	706
142	629
43	524
19	706
56	803

FLORENCE A. SMITH, APPELLEE, v. JAMES WOODS  
SMITH, APPELLANT.

1. **Husband and Wife: DOMICILE.** The general rule is that the domicile of the wife follows that of the husband. This is based upon the unity of husband and wife, and generally implies continuing, though temporarily interrupted, cohabitation. Proof of the domicile of the husband is sufficient *prima facie* to establish that of the wife.
2. **Divorce in Foreign State or Territory.** A divorce procured in Salt Lake City while neither of the parties were residents of that territory is null and void.
3. ———: **RESIDENCE.** To give the court jurisdiction in an action for divorce at least one of the parties must be a *bona fide* resident of the state or territory where the action was brought.
4. ———: **PETITION.** A denial in the language of the petition that the defendant "denies that said marriage was unlawful and wrongful, and denies that he has cohabited with L. W. S., etc., in a state of adultery," is not a denial of the cohabitation.
5. ———: **ALIMONY.** Permanent alimony held to be excessive, and reduced to \$4,000.

APPEAL from the district court of Sherman county.  
Tried below before TIFFANY, J.

*Jas. E. Philpott*, for appellant.

*Wall & Heath, Lewis A. Groff*, and *A. H. Conner*, for appellee.

MAXWELL, CH. J.

In August, 1883, the plaintiff filed a petition in the district court of Sherman county against the defendant for a divorce, a *vinculo matrimonii*, for the custody of a child of said parties, and for alimony, and on the trial of the cause a decree was rendered in her favor with alimony in the sum of \$6,000, to be paid in installments. The defendant appeals.

The plaintiff alleges in her petition that she has been a resident of this state for one year last past, and that she is at the present time a *bona fide* resident of Sherman county; that on the 24th day of August, 1871, at Cincinnati, Ohio, was married to the defendant, and ever since has been a faithful wife.

That she had, while married to Smith, one child, Harry W. Smith, now 10 years old.

That defendant, on or about the 17th day of April, 1883, committed adultery with one Lotta W. Smith, at Salt Lake City, in Utah territory, and at sundry and divers times between March 27, 1883, and July 30, 1883, at said Salt Lake City, and divers other places in said territory, commit adultery with said Lotta W. Smith, and that the defendant *has left her and resides*, as she believes, in said Salt Lake City.

That on the 11th day of December, 1882, the defendant filed his petition for a divorce in the probate court for Salt Lake county, Utah territory, against the plaintiff, and alleged therein that this defendant, for one year last past, has been an actual *bona fide* resident of Salt Lake City and county, in Utah territory; that this plaintiff has been guilty of cruel treatment towards defendant to the extent of causing him great mental distress; that their infant son had suddenly died in December, 1879, and plaintiff continually ever since cruelly and heartlessly accused the defendant of being the murderer of said child.

That defendant, in July, 1880, took plaintiff to Loup City, where he had established himself in business, and had purchased property to provide plaintiff with an inviting and comfortable home, and that plaintiff, without cause, refused to live there, she alleging that she would not live in a new western country, and would not reside in the same county where defendant's father and father's family were brought by defendant to live; that plaintiff had refused to live and cohabit with defendant; that all the

allegations said petition contained were in fact false and untrue; that the defendant concealed from her both the pendency of said suit and the fact that said probate court had, on the 27th day of March, 1883, by the fraudulent, false, and untrue evidence of defendant, been led to grant defendant a so-called decree of divorce, and had given the custody of said Harry W. Smith to defendant.

That said defendant, since the 27th day of March, 1883, has wrongfully and unlawfully gone through the ceremony of marriage with said Lotta W. Smith, and has since cohabited with her in a state of adultery at said Salt Lake City, and at divers other places in said Utah territory.

That said so-called divorce decree is fraudulent, null, and void, and that said marriage with said Lotta W. Smith is null and void. That said probate court, on said 11th day of December, 1882, had no jurisdiction of the subject matter of said petition of defendant's, and no jurisdiction of the person of *this defendant*.

That defendant is the owner of real property of the value of \$20,000, and personal property of the value of \$12,000, and plaintiff is entirely without means to support herself and child, or to prosecute this action, and defendant refuses and neglects to supply the necessities of the plaintiff and said child.

On the 27th day of January, 1884, defendant filed his answer, setting up his defense as follows:

1st. Defendant admits he was so married to the plaintiff; that Harry W. Smith is the issue of said marriage; that his residence was in said Salt Lake City; that he filed said petition in Sherman county district court, and denies that it was fraudulently and unlawfully filed. He admits the withdrawing of said petition from said district court, and denies that he withdrew it for the reasons and intent set forth in plaintiff's petition.

He admits that on the 11th day of December, 1882, he filed his said petition for a divorce from the plaintiff in the



probate court in said Salt Lake county, in Utah territory, and that said petition contained the said allegations set forth in plaintiff's petition in this suit, but denies that said allegations were false, and avers that they were in fact true.

He admits that on the 27th day of March, 1883, by the decree of said probate court, he was divorced from the plaintiff herein from the bonds of matrimony, which decree is in the words and figures as follows:

James Woods Smith }  
vs. } Findings.  
Florence A. Smith, }

This cause having been this day submitted to the court for decision, upon the complaint of the plaintiff, the default of the defendant, and the testimony, and proofs, the court finds the following facts:

1st. The plaintiff and defendant were married at Cincinnati, Ohio, August 24, 1871.

2d. Plaintiff is, and has been for more than a year prior to institution of this action, and now is, a *bona fide* resident of the county of Salt Lake, within the jurisdiction of this court.

3d. Plaintiff and defendant have one child.

4th. That from the year 1879, and including December of that year, the defendant has been guilty of cruel treatment of the plaintiff, to the extent of causing great mental distress to the plaintiff, in accusing him unjustly of the murder of his deceased boy; by refusing to live with him, by insulting and abusing himself, his father, and his father's family, without provocation, \* \* \* and in refusing to cohabit with him.

#### CONCLUSIONS OF LAW.

1st. That plaintiff is entitled to a decree from this court dissolving the bonds of matrimony between plaintiff and defendant, decreeing each to be free and absolutely released from the bonds of matrimony.

2d. That plaintiff is entitled to the sole charge and custody of his said son.

DECREE.

This cause came on to be heard this 27th day of March, 1883, upon plaintiff's complaint, the proofs and testimony in said action, and the default of the defendant, *after due publication of summons herein*; and it appearing to the court that all the material facts stated in said complaint are sustained, and that the matters so alleged and proved are sufficient in law to entitle the plaintiff to the relief prayed for in his complaint; that the plaintiff was a resident of the city and county of Salt Lake, territory of Utah, within the jurisdiction of this court, at the time of the commencement of this suit, and had been for a period of one year prior thereto—it is ordered, adjudged, and decreed that the court, by virtue of the power and authority therein vested in such case made and provided, does order, adjudge, and decree that the marriage between the said plaintiff, James W. Smith, and Florence A. Smith be dissolved accordingly, and each of them freed and absolutely released from the bonds of matrimony and all the obligations thereof. \* \* \* \* \*

E. SMITH,

*Probate Judge for said Salt Lake County.*

Defendant alleges that from and since the 27th day of March, 1883, the plaintiff has not been the wife of the defendant.

Defendant admits that since the 27th day of March, 1883, he was married to one Lotta W. Smith, and denies that said marriage was unlawful and wrongful; and denies that he has cohabited with said Lotta W. Smith at Salt Lake City, in the territory of Utah, and at sundry and divers other places in Utah territory, *in a state of adultery*. He denies each and every other allegation contained in plaintiff's petition, and prays that said decree herein pleaded may be undisturbed and sustained and enforced in

the state of Nebraska; that plaintiff take nothing by her petition, and that defendant go hence without day.

On the 2d day of May, 1884, the plaintiff filed her reply, stating therein that she "denies that the notice ordered to be published by the probate court of Salt Lake county, Utah, was published by said plaintiff in said suit of James Woods Smith vs. Florence A. Smith, for the time and as required by order of said probate court, and as required by the laws of the territory of Utah."

The first objection made by the appellant is that the proof fails to show that the plaintiff had been a resident of the state for one year prior to filing her petition, and that she was a *bona fide* resident thereof when the action was brought. The statute requires a six months' residence before bringing the action, and that the party shall be a *bona fide* resident of the state. The testimony clearly shows that the domicile of the defendant for a number of years • prior to the bringing of this action was at Loup City. The general rule is that the domicile of the wife follows that of the husband. *Greene v. Greene*, 11 Pick., 410. *Hairston v. Hairston*, 27 Miss., 704. *McAfee v. Kentucky University*, 7 Bush., 135. *Brewer v. Linnaeus*, 36 Me., 428. This rule goes upon the unity of husband and wife, and generally implies continuing, though temporarily interrupted, cohabitation. Permanent separation usually implies separate domiciles; but in the absence of any proof showing a separate domicile of the wife, proof of the domicile of the husband will be sufficient to establish that of the wife. The defendant virtually admits this by bringing an action for a divorce in Sherman county, which he afterwards dismissed, apparently when he found it would be contested. The domicile of the husband, therefore, was that of the wife, and the first objection is untenable.

2. That the defendant obtained a valid decree of divorce from the probate court of Salt Lake county, Utah.

In *Cook v. Cook*, 56 Wis., 195, it is said, "Marriage is

not only a contract, but, when consummated, creates the most peculiar and solemn of all domestic relations. It comes into existence in pursuance of a contract, but when formed it involves rights and duties flowing from a source transcendently above any and all contracts which the parties are capable of making. It is akin to the tender relation between parent and child, and has a peculiar sanctity not to be expressed in any commercial phraseology like the word 'contract.' Its obligations can be enforced, and its violations redressed in ways unknown to the law of contracts. It is shielded from unholy intrusion by severe penalties, enacted in laws both human and divine. It unites two persons for life by giving to each a new *status* before the law as to society, each other, and the property of each. This *status* not only involves the well-being of the parties thus united, but the good of society and the state. It is therefore a proper subject of legislation. It may, from public considerations, be defined, regulated, and controlled by law. In this country it is not a matter of national but state legislation. But, as already observed, this court has held that the legislation of this state is for the citizens of this state, and not for the citizens of other states. Undoubtedly each state has the power to absolutely fix, regulate, and control such status as to each and all of its own citizens. Of course, every other state has the same power. From this it logically follows that no one state has the power to fix, regulate, or control such status as to the citizens of any other state. It is true, when such status is once rightfully fixed by a state in which the person to whom it attaches resides, it necessarily follows the person, even though he goes into another state, and it continues with him until refixed by another rightful jurisdiction in which he has subsequently become a resident." The statutes of a state, except as they relate to property of non-residents situate therein, necessarily are passed for the residents of the state, as such statutes can

have no extra territorial effect. Such statutes, therefore, require the petitioner for a divorce to have resided in the state for a certain period, and to be a *bona fide* resident. This does not mean that a party shall not come into the state and become a resident thereof and apply for a divorce, but that he shall not, while a resident of another state, come temporarily into the state and obtain a divorce and then return to the state of his residence. In a divorce suit the court, in granting a decree, declares and fixes the *status* of the parties to the suit. If but one of the parties is a resident of the state, and the other a non-resident, the court in a proper case may adjudge the status of the resident towards the non-resident, but it has no such power over residents of another state. Suppose, in a proceeding to subject property to the satisfaction of a debt upon constructive service, that the property was not within the jurisdiction of the court or subject to its control, could the court make a valid order or judgment affecting it? That it could is conceded. This is illustrated by the case of *Williams v. Lowe*, 4 Neb., 382, where an assessment was levied upon shares of stock in a ferry company, and a suit in chancery was thereupon brought to subject the shares to the payment of such assessment, although the shares of stock were not within the jurisdiction of the court nor under its control. Service was had by publication, and a decree taken by default and the shares sold. Afterwards the owner of the shares brought an action against the purchaser of the shares for an account, etc., alleging the invalidity of the proceedings; and this court held that the proceedings were void, for the reason that "the jurisdiction can only be exercised by having the thing in the custody of the law." The same rule applies in divorce proceedings to the extent that at least one of the parties must be a resident of the state or territory granting the divorce; and unless this is the case there is nothing before the court upon which it can act, and a decree rendered by it can have no binding effect.

In this case the testimony clearly shows that the defendant was a resident of Sherman county at the time the action for divorce proceedings was pending in Salt Lake. The action of that court, therefore, was an absolute nullity. The right to a divorce when it exists will, like any other right, be enforced by our courts. But a divorce obtained by a resident of this state going into another jurisdiction temporarily and procuring the same in a secret and clandestine manner, is of no force and effect. The question of residence is one of fact to be determined from the testimony in each case; but as there is no conflict in the testimony we must hold the Salt Lake divorce void.

3. That there is no proof that the defendant committed adultery with Lotta W. Smith. It will be observed that it is alleged in the petition, "that since the 27th of March, 1883, the defendant has wrongfully and unlawfully gone through the ceremony of marriage with said Lotta W. Smith, and has since cohabited with her in a state of adultery at Salt Lake city," etc. The answer to that allegation is that he "denies that said marriage was unlawful and wrongful, and denies that he has cohabited with said Lotta W. Smith at Salt Lake city, in the territory of Utah, and at sundry and divers other places in Utah territory in a state of adultery. This is not a denial of the cohabitation. *Harden v. A. & N. R. R. Co.*, 4 Neb., 521. *Moser v. Jenkins*, 5 Oregon, 447. *Young v. Catlett*, 6 Duer, 437. *Larney v. Mooney*, 50 Cal., 610. *Schaetzel v. Germantown Ins. Co.*, 22 Wis., 412. Maxw. Pl. and Prac. (4th ed.), 180. The cohabitation, therefore, is admitted, and as the divorce was a nullity the adultery is admitted on the pleadings. *Reemie v. Reemie*, 4 Mass., 586. *Wilson v. Wilson*, Wright, 128-9. Stewart on M. and D., sec. 246, therefore, are not applicable.

4th. That the alimony is excessive. In the decree the court below finds the value of the defendant's property to be the sum of \$15,905.53 over and above all incumbrances,

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 Nelson v. Bevins.
 

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and that the plaintiff has received as temporary alimony and otherwise money and property of the value of \$2,000. There is also testimony showing that she had money and property of her own of the value of about \$800. There is no fixed rule as to the proportion of the husband's property or permanent alimony to be decreed to the wife on granting a divorce. The amount is to be just and equitable, due regard being had to the legal and equitable rights of each party, the ability of the husband, the special estate of the wife, and the character and situation of the parties. *Varney v. Varney*, 58 Wis., 19.

The wife seems to have contributed but little to the common fund. Probably that was not her fault, but the fact remains. The defendant's property consists largely of real estate and liable to fluctuate in value, and in our view the alimony is excessive. Permanent alimony, which will include dower, will therefore be reduced to four thousand dollars, to be paid in equal semi-annual installments in five years, commencing July 1st, 1886, and that defendant pay the costs of suit, and as thus modified the judgment is affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

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PETER NELSON, APPELLEE, V. ANDREW BEVINS ET AL.,  
APPELLANTS.

19	715
40	138
19	715
50	659
50	763
53	584

1. **Res Adjudicata.** Matters that have been adjudicated in a former suit will not be considered in a second action.
2. **Husband and wife: MORTGAGE: CONSIDERATION.** Where at the time of the execution of a promissory note by the husband he agreed that his wife should execute a mortgage on cer-

tain real estate possessed by her to secure the same, which mortgage a few days afterwards was duly executed and acknowledged, and by reason of which the credit on the note was extended two years, *Held*, That there was a sufficient consideration for the mortgage.

3. **Purchaser pendente lite.** Where a person purchases real estate while an action is pending to subject the property to the payment of a certain debt, the purchaser is chargeable with notice of the claim, and whatever the form of the decree under the issue made by the pleadings, takes subject to the same.

**APPEAL** from the district court of Douglas county.

*Bevins & Churchill*, for appellants.

*J. J. O'Connor* and *Charles Ogden*, for appellee.

MAXWELL, CH. J.

This case was before this court in 1883 and is reported in 14 Neb., 153. In that action it was stated, in substance, that on or about the 22d of September, 1879, Andrew Bevins purchased the premises in controversy, taking the title thereto in the name of his wife Alice Bevins; that about the same time the defendants Bevins and wife applied to the plaintiff for a loan of six hundred dollars for the purpose of erecting a house on the land in question; that it was agreed between the parties that they should have the sum required out of a note which Bevins then held for collection, the defendants Bevins and wife to secure said money by executing a mortgage on said premises due in one year from November 10th, 1879; that about the 10th of November, 1879, Bevins gave the plaintiff his note for \$600, and agreed that the mortgage should be executed in a short time; that about the 24th of that month Bevins and wife did execute a mortgage on said premises to the plaintiff for the sum of \$350, and reciting therein the payment of \$250, and providing that the mortgage should not



be foreclosed until two years from the maturity of the note. Bevins being the plaintiff's attorney at that time, placed the mortgage on record without presenting it to the plaintiff. In January, 1880, the plaintiff discovered the character of the mortgage and refused to accept the same, and thereupon Bevins promised to have a new mortgage executed, due on November 10th, 1880, and relying upon this agreement the plaintiff canceled the mortgage on record. Afterwards Mrs. Bevins refused to execute a new mortgage and the action was brought to enforce specific performance of the agreement to execute a mortgage on the real estate in question, and for a decree foreclosing said mortgage and for general relief. The court below in that case found for the plaintiff, enforced the contract made with Bevins for the execution of the mortgage due in one year from November 10th, 1879, and rendered a decree foreclosing the same. The defendants Bevins and wife then appealed to this court, where, as the proof failed to show that Bevins was the actual owner of the property, he could not without special authority bind his wife by an agreement to make a mortgage, and there being no proof of special authority, the agreement, so far as the wife was concerned, was held void.

But as the cancellation of the mortgage due in three years had been obtained under the promise of Bevins to execute a mortgage due in one year, the cancellation was set aside and the mortgage reinstated. An examination of the brief of Judge Wakeley, Bevins's attorney, will show that to have been the sole question upon which the appeal was taken; although, as an incident, it was argued that the canceled mortgage could not be reinstated. The court, however, under the facts in that case, held otherwise. While the action was pending in the supreme court Hendrix purchased the land in question with full notice of the plaintiff's rights. After the mortgage as reinstated became due this action was brought to foreclose the same, and Bevins

in his answer alleges substantially the same defenses as in the former suit, with the additional one that the plaintiff is indebted to him for services rendered in collecting a certain note against one Witherell. Mrs. Bevins pleads want of consideration for the signing of the mortgage on her part. All the defenses set up by Bevins accrued before the decree was rendered in the former case, and were fully adjudicated in that; and in the absence of fraud or mistake, of which there is no claim, will not be again considered. In regard to the defense of Mrs. Bevins it is sufficient to say that the agreement to execute the mortgage was made at the time of the execution of the note by her husband. The effect of giving the mortgage was to extend the credit two years, and no defense of this kind was interposed in the former suit, in which this court declared the mortgage valid by reinstating it. We therefore adhere to our former ruling, that the mortgage is valid. There can be no personal judgment against Alice Bevins, however, for deficiency, as she did not sign the note.

2d. It is alleged on behalf of Hendrix that he is an innocent purchaser, because he purchased without notice of any claim under this mortgage, it having been canceled of record when he made the purchase. It is a sufficient answer to this objection to say that he purchased with full notice that an action was pending to subject the property to the satisfaction of the plaintiff's claim. The particular form in which this satisfaction was to be obtained was not material if the property was to be sold for that purpose. That Hendrix had notice of this debt is unquestioned; and that it was a lien, or was sought to be made a lien, on the property is clearly established. Courts do not, where it can be avoided, sustain technical defenses the effect of which will be to defeat rights, but endeavor as far as possible to administer the law in such a manner as to do justice between the parties.

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Cummings v. Winters.

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Substantial justice has been done in this case, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19 71  
25 230

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ARTHUR CUMMINGS, PLAINTIFF IN ERROR, V. JAMES WINTERS, DEFENDANT IN ERROR.

1. **Forcible Entry and Detention:** NOTICE TO QUIT. In a notice to quit in forcible entry and detainer a description of the land by numbers, as "the N. E.  $\frac{1}{4}$  of section 28, T. 7, R. 7," "the premises now occupied by you," is sufficient.
2. **Verdict.** A verdict that is against the clear weight of evidence will be set aside.
3. **Evidence:** ADMISSIONS. The admissions of a party to an action can be proved against him when they are so connected with the main transactions involved in the litigation as to be material to the issue. *Hooper v. Browning*, ante p. 420.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

*Dilworth, Smith & Shockey*, for plaintiff in error.

*Leslie G. Hurd*, for defendant in error.

MAXWELL, CH. J.

This is an action of forcible entry and detainer brought by the defendant in error against the plaintiff to recover the possession of the north-east quarter of section 28, township 7, range 7, in Clay county. The case was commenced before a justice of the peace, and an appeal taken from his judgment to the district court, where a verdict was returned in favor of the defendant in error and judgment rendered thereon.

The first objection is that the notice to quit is not sufficient. It is as follows:

"NOTICE TO QUIT.

"*To Arthur Cummings—*

"I hereby notify you to leave the premises now occupied by you, to-wit: The N. E.  $\frac{1}{4}$  of section 28, T. 7, R. 7. If you fail to comply with this notice within three days after the service, I shall institute legal proceedings to claim (obtain) possession of said premises.

"Signed,

"JAMES WINTERS, by

"L. G. HURD,

"*His Attorney.*"

This notice was served March 2d, 1885. The action was begun March 6th, 1885. The objection made to the notice was that it did not describe the premises. The description certainly is sufficiently definite to enable any person familiar with the mode of numbering the different subdivisions of land adopted by the government to identify the premises, and this is sufficient, independently of the further statement of occupation by the defendant. *Miller v. Hurford*, 13 Neb., 23-24. This objection, therefore, was properly overruled.

2d. That the verdict is against the weight of evidence. The testimony tends to show the following facts: That in the year 1884 the plaintiff in error rented the land in controversy, the lease terminating on the 1st of March, 1885; that some months prior to the expiration of the lease the defendant in error informed the plaintiff that if he did not sell the land he (the plaintiff) could remain another year; that the plaintiff thereupon relied on this statement and made arrangements to remain the second year; that about the 23d of February, 1885, the defendant went to the plaintiff's residence "to see if he was preparing to go." The plaintiff then informed him "that he thought he could hold it according to law, and did not intend to go." The testi-

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 Davey v. Dakota County.
 

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mony shows that the defendant did not sell the place. The plaintiff, therefore, was entitled to hold it for the second year, and this action is premature.

3d. On the trial of the cause the plaintiff in error called one William Taylor as a witness, who testified: "I live in Clay county, and am acquainted with the parties." He was then asked: "Did you have a conversation with Mr. Winters about leasing this land, wherein he stated to you that he had leased the farm to Cummings for 1885?" This was objected to as "immaterial, irrelevant, incompetent, and no time stated." These objections were sustained. In this, we think, there was error. The witness should have been permitted to state whether or not he had a conversation with Mr. Winters, as the admissions of the defendant in error, if against his claim to the possession of the premises, no doubt would have been admissible in evidence. *Stephens v. Vroman*, 16 N. Y., 381. *Hooper v. Browning*, ante p. 420. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

16	751
26	123

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JOHN M. DAVEY ET AL., APPELLANTS, V. THE COUNTY  
OF DAKOTA ET AL., APPELLEES.

1. **Petition: DEMURRER.** A demurrer to a petition will not lie for a misjoinder of parties plaintiff.
2. **Specific Performance: PARTIES.** Where the owners of two adjoining tracts of land made a joint proposition to sell said land to D. county for a poor farm, which proposition was accepted, *Held*, That such owners could join in an action to enforce said contract.

3. ———: ———: ACTION AGAINST COUNTY. Where a board of county commissioners, in pursuance of lawful authority, invite and accept bids for a poor farm, to be paid for out of funds in the treasury for that purpose, the vendors may enforce specific performance of such contract against the county.

APPEAL from the district court of Dakota county. Heard below before CRAWFORD, J.

*Barnes Bros.*, for appellants.

*Isaac Powers, Jr.*, and *M. C. Jay*, for appellees.

MAXWELL, CH. J.

This action was brought by the plaintiffs against the defendants in the district court of Dakota county to compel the specific execution of a contract which it is alleged the defendants entered into with the plaintiffs. A demurrer to the petition was sustained in the court below, and the action dismissed. The plaintiffs appeal.

It is alleged in the petition, in substance, that at a regular meeting of the board of county commissioners of Dakota county it was deemed and determined that it was necessary and for the best interest of said county to purchase and maintain a poor farm for the care of the county poor of said county; and in that behalf said board did, on the 20th day of June, 1884, levy a tax of three mills on the dollar valuation of the taxable property of said county for the purpose of purchasing and maintaining said poor farm; that said tax has been collected, and there is now in the hands of the treasurer of said county for the payment of said poor farm the sum of \$2,000; that in pursuance of said purpose to purchase a poor farm said board did, on the 8th day of November, 1884, order the clerk of said county to advertise for bids to furnish land for said farm, and that said advertisement was duly published as required by law; that the plaintiffs, in pursuance of the terms of

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Davey v. Dakota County.

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the advertisement, then being the owners of the following described lands, to-wit: John M. Davey being the owner of the east half of the south-west quarter of section 13, township 28, range 6 east, in fee, and Patrick Twohig being the owner in fee of the west half of the south-east quarter of section 13, township and range aforesaid, "all constituting a single tract or body of land situated in said county, and being suitable for a poor farm, jointly and acting together, did put in and submit to said board a proposition in writing to sell said body of land to said county of Dakota for the purpose of a poor farm; that on the 13th day of December, 1884, said board accepted said proposition and caused said acceptance to be entered on their records; said entry being as follows: "And now at this time in the matter of bids for a poor farm the board of commissioners have accepted the bid of Patrick Twohig for the W.  $\frac{1}{2}$  of S. E.  $\frac{1}{4}$  of section 13, town 28, of range 6 east, containing 80 acres, at \$12 per acre, providing the title to said land is perfect, said Twohig to furnish an abstract of title; also the bid of John M. Davey for the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  of section 13, township 28, of range 6 east, containing 80 acres, at \$7.50 per acre, providing the title to said land is perfect, said J. M. Davey to furnish an abstract of title. That on the 31st of December, 1884, said board, acting for the county of Dakota, duly accepted said bids and purchased said lands for the prices above stated, amounting in the aggregate to the sum of \$1,560; that the acceptance of said bids and the making of said order and purchase constituted one and the same transaction in and about the purchase of said poor farm."

The plaintiffs then allege that they duly performed all and every part of the agreement on their part to be performed, and that said lands were free from all liens and incumbrances, and that the plaintiffs' title to the same was and is perfect; but that the defendants refuse to perform the contract on their part. The prayer is that the defend-

ants be required to specifically perform said contract, accept said deed, and pay the plaintiffs the purchase price with interest. There is a further prayer that the premises be sold, and for judgment for deficiency, etc., and also for general relief.

The demurrer is upon the grounds—1st, that the petition does not state facts sufficient to constitute a cause of action; and 2d, a misjoinder of parties plaintiff.

The grounds of demurrer to a petition are prescribed by section 94 of the code, and are—1st, that the court has no jurisdiction of the person of the defendant or the subject of the action; 2d, that the plaintiff has not legal capacity to sue; 3d, that there is another action pending between the same parties for the same cause; 4th, that there is a *defect* of parties plaintiff or defendant; 5th, several causes of action improperly joined; 6th, that the petition does not state facts sufficient to constitute a cause of action.

It will be seen that while misjoinder of causes of action is a cause for demurrer, a misjoinder of plaintiffs is not. The second ground of demurrer, therefore, is not well taken.

The correctness of the ruling of the court on the first ground of demurrer depends upon the authority of the defendants to enter into the contract set up in the petition.

Sec. 17 of chapter 67, Compiled Statutes, provides that, "the county commissioners of each county are authorized, whenever they shall see fit to do so, to establish a poor-house."

Sec. 18 provides that, "the county commissioners are hereby authorized to take to the county by grant, devise, or purchase any tract of land not exceeding six hundred and forty acres, for the purposes of said poor farm."

Sec. 19 authorizes the commissioners to receive donations to aid in the establishment of a poor-house, and to levy from time to time not to exceed one per cent for the purpose of paying for the land, and to erect and furnish buildings suitable for a poor-house, and to put in operation and defray the actual expenses of such poor-house.



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 Bissell v. Fletcher.
 

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Sec. 22 requires the title to the property to be made to the county.

Sec. 23 provides that, "the county commissioners of any county in this state may, at any regular meeting, if they at any time shall deem it to the interest of said county, appropriate out of any funds appropriated to said county for any (that) purpose, or other money belonging to said county, any sum not exceeding two thousand five hundred dollars for the purpose of purchasing a farm and erecting suitable buildings for a poor-house for said county," etc.

The county commissioners therefore had authority to purchase the land in question, and as the contract appears to be fair in all respects the county should act in good faith and perform on its part.

Some objection is made to the prayer of the petition, as not asking appropriate relief. While the prayer is much broader than the relief to which the plaintiffs are entitled, still that is not ground of demurrer. It is sufficient to afford all the relief to which the plaintiffs are entitled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

19	736
27	583
19	736
24	433

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ALFRED BISSELL, PLAINTIFF IN ERROR, v. CLINTON  
FLETCHER, DEFENDANT IN ERROR.

1. **Public Lands of United States: SURVEY: EVIDENCE.**  
In the surveys of the public lands of the United States, the meander lines are generally considered as following the windings of streams; but the question whether they do so or not is a question of fact to be determined by evidence *aliunde*.

2. ———: MEANDER LINES ALONG RIVERS. Where there is a strip of land between the back of the river and the meander line, an entry of government land bounded by the meander line will not include such strip.
3. ———: ———: ACCRETIONS. Where lands had formerly extended to the meander line and the testimony showed that there had been a change in the channel of a river of about three-fourths of a mile, but no accretion to the plaintiffs' land, *Held*, That the boundaries of his land did not extend to the new channel nor beyond the meander line.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

*John Dawson*, for plaintiff in error.

*E. A. Fletcher* and *W. J. Lamb*, for defendant in error.

MAXWELL, CH. J.

This is an action of ejectment, brought by the plaintiff against the defendant to recover possession of certain land which the plaintiff claims belongs to lot 3, sec. 31, T. 2 N., R. 18 W., in Harlan county. On the trial of the cause the court below found the issues in favor of the defendant and dismissed the action.

There is no dispute about the essential facts in the case, and they are as follows: The plaintiff is the owner of lot 3 in sec. 31, T. 2 N., R. 18 W., and is entitled to and is in possession of the same except as hereinafter stated. This lot is shown by the plat and patent introduced in evidence; contains  $52\frac{8}{10}$  acres. The plat shows that the south-west corner of the lot extends to the north channel of the Republican river, and there is some testimony tending to show a meander line between the river and the south line of said tract. The defendant is the owner of lots 6 and 7 in said section and was the owner thereof at the commencement of this action. These lots lie south of lot 3, and in fact between it and the river as it flows at

present. The contention of the plaintiff is, that lot 3 extends to the river; and notwithstanding the fact that lot 3 contains all the land the plaintiff purchased and paid for, and the effect of the extension of the line would be to give him about 117 acres of land to which he seems to have no equitable right, still he contends the law declares the land to be his. It is also shown that lots 4 and 5 in said section, if the plaintiff is entitled to recover, would also be extended to the river and absorb a considerable portion of the tract that the plaintiff claims. There is a paucity of testimony as to the character of the channel of the river along which the meander lines were run; whether in fact the river flowed there at the time the original surveys were made in 1865 and 1869 is not proved. The testimony tends to show that the river at the present time flows about three-quarters of a mile south of lot 3. As to when this change of the channel took place, there is no proof. It is not claimed, however, nor is there any proof that lots 6 and 7 are an accretion to lot 3. The case, therefore, is similar in most respects to that of *Lammers v. Nissen*, 4 Neb., 245. In that case this court, GANTT, J. delivering the opinion of the court, said (page 251): "The mere fact that it is run and is designated upon the plats as a meandered line, certainly cannot be conclusive in the matter. To establish the doctrine that such meander line is conclusive, would estop the government from disposing of lands left unsurveyed between such line and the bank of the stream, and would prevent the correction of mistakes made by surveyors in such case, and would be in direct conflict with the well settled rule of law defining what is an accretion to land." This, we think, states the law correctly. The rule seems to be that if, when the entry of public land is made, the bank of the river at an ordinary stage of water was in fact where the meander line was represented by the survey, and land has since been formed by accretion, it will become the land of the person who

has title to the land immediately behind it. *New Orleans v. United States*, 10 Peters, 717. *Granger v. Swarts*, 1 Woolw. C. C. R., 91. But the plaintiff does not claim the land in controversy as an accretion, and has no right or title to lots 6 and 7 as a part of lot 3. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

19	728
58	811
58	812

THATCHER M. KRUM, PLAINTIFF IN ERROR, v. THE  
STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Rape.** In a prosecution for an assault with intent to commit a rape, an instruction that "there must be an assault and also an accompanying intent, and this intent may be gathered or inferred from *any* circumstances attending the commission of the alleged crime tending in *any manner* to show such intent in the mind of the defendant at the time," is erroneous.
2. —: EVIDENCE. To warrant a conviction in such case, the circumstances when taken together must be of so conclusive a nature as to show the intent beyond a reasonable doubt.

ERROR to the district court for Stanton county. Tried below before CRAWFORD, J.

*H. C. Brome*, for plaintiff in error.

*William Leese*, Attorney General, and *W. F. Bryant*, for the state.

MAXWELL, CH. J.

The plaintiff was tried at the September, 1884, term of the district court of Stanton county, and found guilty of

an assault with intent to commit a rape, and sentenced to imprisonment in the penitentiary. He now prosecutes error to this court.

The testimony tends to show the following facts: That on the 7th of December, 1881, the plaintiff went to the residence of Frank Severin, in the town of Stanton, between five and six o'clock in the evening of that day, and rapped at the door, which was opened by Mrs. Severin, the wife of Frank Severin. She testifies that she "let him in and gave him a chair for him to sit down," that "he begun to talk to me something about money, which I didn't understand." Then follows a statement that she was holding a child about one year old; that as she went to lay the child in the cradle the plaintiff threw her on the bed. Then follows a statement of her struggles, etc., which, as there must be a new trial for reasons hereafter stated, will be omitted.

The testimony tends to show that the house in which the prosecutrix resided was a double one, and occupied at the time by two families; that she had been acquainted with the plaintiff about three years and a half; that the plaintiff was intoxicated at the time. The prosecuting witness was unable to understand the English language, and hence her testimony was taken through an interpreter. In addition to this the questions, even on the part of the state, were to a great extent leading and suggestive of the answers desired, and for this as well as the vagueness of the testimony very much is left to conjecture.

The state then offered to prove from the records of the court that, "an indictment for this same offense was procured against this defendant, and on a plea in abatement was quashed by the court on the 26th day of September, 1882," and \* \* "that a second indictment was found on the following day, to-wit., the 27th day of September, 1882, and that on the same day a *capias* was issued for the

arrest of the defendant on said indictment; and counsel for the state further offers to prove by the clerk of this court that such capias, together with the return, has been lost; and counsel for the state further offers to prove by the sheriff of the county that between the date of the quashing of the first indictment named and the time of finding the second indictment, the defendant herein, Thatcher M. Krum, who had before that time been under arrest pending a trial on the first indictment, escaped from Stanton county and remained away from said county until he was arrested under the capias issued at the last term of this court, and that the sheriff, between the time of such escape and the last term of this court, made diligent search and inquiry, but was unable to find said defendant in *Stanton county*. The state offers to prove said facts as circumstances showing the guilt of the accused."

This, on the objection of the defendant, was excluded, and while no particular point is made on this offer by the plaintiff in error, although the objection is urged in the brief, we desire to say that such an offer made in the presence of the jury for the purpose named could not fail to be prejudicial. There is no testimony whatever that Krum was a resident of Stanton county, or that he went to any other place than his own home. When he left Stanton county he was not under arrest, nor, so far as appears, under any obligation to remain in Stanton county. How, then, could he escape? To constitute an escape there must be an actual arrest and a legal and continuing imprisonment. 1 Bish. Cr. Law, § 919. From some unexplained cause no effort, so far as this record discloses, was made to institute a prosecution against the plaintiff in error until a considerable time after the commission of the alleged offense, and nearly two years elapsed from the time the second indictment was found before the cause was brought to trial. No doubt there was a cause for this delay, but it does not appear in the record. The mere fact that the

accused did not reside in Stanton county, if his residence was known, or with proper inquiry could have been ascertained, is not a satisfactory explanation of the delay.

In *St. Louis v. State*, 8 Neb., 411-412, where an improper question was asked and excluded, this court refused to reverse the case for that cause alone. A different rule, however, may obtain where there is an offer of evidence which is clearly incompetent, as that the defendant has committed a crime other than that with which he is charged. The effect of such an offer cannot fail to be prejudicial to the accused on the minds of the jury, and nothing that the court can say will entirely obliterate the effect. Cases are to be tried upon the evidence, and the guilt of the accused determined from that alone, and no prosecuting officer should be permitted to supply its place with prejudice.

The court at the request of the state gave the following instruction:

"No. 2. An assault with intent to commit a rape is a crime made up of many parts, all of which must exist to make the crime complete.

"There need be no rape. It is only necessary that the defendant should commit the assault as charged with that intent (to commit rape) in his mind.

"There must be an assault and also an accompanying intent, and this intent may be gathered or inferred from any circumstances attending the commission of the alleged crime tending in any manner to show such intent in the mind of the defendant at the time."

No case has been cited to sustain this instruction, and I think none can be found. The intent to commit the offense charged in the indictment constitutes the felonious act, and this intent is to be gathered from the circumstances, not from one but from all, and the circumstances when taken together must be of so conclusive a nature as to establish that fact beyond a reasonable doubt. *Walbridge*

*v. State*, 13 Neb., 236. *People v. Levison*, 16 Cal., 98. *People v. Phipps*, 39 Id., 326. *Sumner v. State*, 5 Blackf., 579. *Com. v. Webster*, 5 Cush., 296. 3 Greenleaf Ev., § 29.

In *People v. Levison*, *supra*, it is said: "The court should in criminal cases instruct the jury hypothetically as a general rule. It should not assign a conclusive effect to circumstances, or assume that they are proven. It is for the court to determine the admissibility of evidence, and for the jury to determine its effect and credibility of the witnesses. In *State v. Canada*, 27 N. W. R., 288, recently decided by the supreme court of Iowa, it was held that to sustain a conviction for assault with intent to commit a rape the evidence must show that the accused had a purpose, not only to have sexual intercourse with the prosecutrix, but must have intended also to use whatever degree of force might be necessary to overcome her resistance and accomplish his object. This we regard as a correct statement of the law. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

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LEWIS L. MARBLE ET AL., PLAINTIFFS IN ERROR, V.  
THE JONES & MAGEE LUMBER COMPANY, DEFEND-  
ANT IN ERROR.

**Mechanic's Lien:** CASE STATED. A lumber dealer was furnishing lumber for the erection of a building in the course of erection under contract; the contractor applied at the lumber yard for certain pieces of lumber, stating that the immediate purpose for which he wanted them was to prop up the brick walls; that he might use them in the erection of the building; that if



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Marble v. Lumber Co.

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he did not use them in the building he would return them; that if he did use them he would notify the lumberman, so that he might charge them up; four days after the delivery of the last material for said building by the lumber dealer other than the pieces of lumber in question the contractor applied at the office of the dealer, told him that he had used the said pieces of lumber in the building, and to charge them up. *Held*, That for the purposes of the mechanic's lien law the said pieces of lumber were furnished at the date of the notification of the lumber dealer by the contractor; that he had used them in the building, and to charge them up.

ERROR to the district court for Gage county. Tried below before BROADY, J.

*Phil. E. Winter and Hazlett & Bates*, for plaintiff in error.

*Hardy & McCandless*, for defendant in error.

COBB, J.

This action was brought in the court below to enforce a mechanic's lien for lumber furnished by the plaintiff company to the defendants Marble & Darling, and by them received for and used in the erection of a certain building for and on the land of the other defendants in the action. So far as can be ascertained from the abstract there was no answer or appearance in the case by or on the part of the defendants Marble & Darling. The other defendants appeared and answered, admitting the partnership of defendants as alleged, and the ownership of the premises as alleged, but denying each and every other allegation contained in the plaintiff's petition.

There was a trial to the court, which found generally for the plaintiff and against the defendants, and found the amount due the plaintiff from the defendants for material furnished, etc., at \$1045.75, and that the same was a lien on the real estate described in the petition.

A motion for a new trial was overruled, and the cause is brought to this court by the answering defendants.

Under the general assignment of error, that "The findings are not sustained by sufficient evidence," two points are presented: *First*, That the account in writing of the items of material furnished for the building was not filed in the county clerk's office within sixty days from the furnishing of such material; and *Second*, That the court erred or made a mistake in computing the amount due the plaintiff for such material. It appears from the transcript that the account in writing of the items of material furnished, etc., was filed in the office of the county clerk on the 14th day of November, 1882. So that unless the said material, or some substantial portion thereof, was furnished by the plaintiff as late as the fifteenth day of September of that year, the account was not filed within the time required by the second section of chapter 54 of the compiled statutes. By reference to the bill of particulars attached to the petition, which I assume to be a correct copy of the account of items furnished, as filed in the office of the county clerk, I find the following items under date September 15th, 1882.

"6 8s, 4x4—24 192

4 8s, 4x4—22 116 308 C. 26, 800.

2 8s, 2x12—16 64 C. 26, 166—966."

As to these items, A. G. Davis, a witness on the part of the plaintiff, and who was the agent in charge of plaintiff's business at Wymore, when the items of building material constituting plaintiff's claim were furnished, testified in rebuttal, as follows:

Q. Look at these items of the 15th of September, 1882 (giving the items as above). Tell the court if you have any present recollection as to the delivery of these articles?

A. These pieces were borrowed from the yard I was clerking in, some quite a while before, as I under-

stood, for braces for the building, and the carpenter said he wanted them for braces.

Q. Who was that?

A. It was Marble. He told me if he used them in the building he would come in and have them charged, and if not, he would return them; and on the 15th day of September he came in and said they were used in the building.

Q. What else?

A. These three items.

Q. Did he say he would take them?

A. He said they were used in the building, and to charge them up."

Upon the above facts, which were, of course, found to be true by the trial court, I think that September 15th, 1882, was the true date of delivery for the purposes of the lien. That was the day upon which plaintiff was authorized to charge these items up to the defendants, or either of them; and clearly, if the books of the plaintiff were properly kept and the items charged under the proper dates, it must be held to be in time if it proceeded to file the lien within the statutory limitation after such dates.

The Minnesota case cited by counsel for plaintiffs in error, *Johnson v. Gold*, XXI. N. W. R., 719, is not in point. In that case certain doors were charged in the "account of items," under a certain date. It was in proof before the trial court; it seems that some time afterwards, there were also furnished three lights of glass and a transom, which were set in or attached to these doors, or some of them, and the plaintiff in that case contended that the time limited for filing the lien only commenced to run from the date of the furnishing of these lights of glass and transom for the doors, and as I understand the opinion, such would have been the holding of the court had the lights of glass and transom been charged in the account as separate and substantive items, which they were not.

Upon the second point I have not only thoroughly examined the abstract, but also the transcript itself, and have come to the conclusion that there was a mistake or error committed by the trial court in computing the amount of the finding and judgment, which must be rectified, or the judgment must be reversed. Indeed the writer is almost inclined to favor a peremptory reversal of the judgment as a method of emphasizing our disapproval of what seems from the evidence to have been the manner of keeping the books of plaintiff company. It appears to have been their custom, when a person proposing to build would deliver to them an estimate of the quantity, quality, and dimensions of the lumber to be used in the erection of such building, they would enter the same in detail on their books in the shape of a debit account against such person, giving the price of each item. Then, if the prices suited the builder, and other circumstances resulted in the building being proceeded with, they would check off each item as delivered. It seems that form of book-keeping was pursued in this case. As well as I can make out the evidence the lumber as set out in the original estimate was described in the bill of items filed with county clerk and sued on in district court, but that such was not the true description of the items of lumber actually delivered, I quote further from the testimony of the witness Davis:

Q. (Handing witness a book.) You may look at that book and state what book that is.

A. That is the original estimate of the Marble & Darlings bill for Winters; the book that contains the estimate.

Q. Is that the book in which all the original estimates were entered by the agent of the Jones & Magee Lumber Co.?

A. Yes.

Q. That is the estimate of the bill of lumber of this building in controversy, is it?

A. Yes.

Q. Who made that estimate? Who wrote that?

A. That, I think, is the clerk's putting down the estimate.

Q. (By the court.) What kind of a book is this—the original estimate?

A. A man fetches in a bill to be figured on; we put his bill down just as he wants the lumber, and carry out the figures and tell him what we will sell him that amount of lumber for; then if he buys we deliver him so much lumber.

Q. Did he make an agreement for that lumber?

A. That is the estimate we filled.

Q. That is the memorandum of the amount sold?

A. The memorandum of the amount the carpenters wanted figured on; if somebody had sold cheaper I would have crossed it out as not sold, and if ours is the lowest we deliver from that.

Q. He accepted that estimate?

A. He accepted that estimate.

Q. Do you know whether it is correct or not?

A. That is correct.

Q. That is a custom you have of putting down estimates that way?

A. Yes.

Q. That was all put down at the time before the delivery was made?

A. Yes.

Q. And you delivered according to that?

A. Yes, and checked it off.

Q. What did you say about its being correct?

A. I say it is correct to the best of my knowledge.

Q. (By Mr. Ashby.) Now you may state what changes are made in that estimate.

A. That is my own handwriting; it says: "This bill wants to be changed from 120 pieces 2x12—24 to 20 pieces 2x12—24; from 180 pieces 2x12—26 to 230 2x12—26."

Q. (By the court.) When was that to be done?

A. Before the bill was sold.

By reference to the bill of particulars attached to the bill of exceptions it will be seen that it differs from the items of account filed with the county clerk, a copy of which was also attached to the petition in the number of pieces, the number of feet of lumber is carried out, and charged for just the same—say: “20 ps. 2x12—24—5,760,” while 20 pieces 2x12—24 feet only makes 960 feet of lumber, and at \$32 per thousand amounts to \$30.72, while it goes into the bill finding and judgment as 5,760 feet of lumber at \$32 per thousand, amounting to \$184.32, and making a difference against the defendants of one hundred fifty-three dollars and sixty cents. It seems that the whole bill was discounted a considerable sum, but the rate per cent is not given, and the time at my disposal does not admit of my making a calculation, either of the discount or interest applicable to this overcharge. It will be assumed that one about balances the other.

The judgment of the district court will be reversed and the cause remanded for a new trial, unless the defendant in error shall, within twenty days from the date of the filing of this opinion, remit from said judgment the sum of one hundred fifty-three dollars and sixty cents, in which case said judgment is to stand affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM BOLDT ET AL., PLAINTIFFS IN ERROR, V.  
GOTTFRIED BUDWIG ET AL., DEFENDANTS IN ERROR.

1. **Parties: PETITION: DEMURRER.** That there are too many plaintiffs or defendants joined in a petition is not a ground of demurrer under the code; nor is such question raised by an objection made by the defendant at the trial to the introduction of any testimony for the reason that the petition fails to state a cause of action.
2. **Petition: DEMURRER.** There are but *six* grounds or causes of demurrer to a petition under the code, and to render a demurrer effective one at least of such grounds or causes must be substantially stated.
3. **INSTRUCTIONS** set out at length in the opinion examined and found properly given and refused.
4. **Slander: EVIDENCE.** In an action of slander where words set out in the petition are actionable *per se* no evidence need be given of actual damage to the character, nor of the mental suffering of the plaintiff.
5. **New Trial: MOTION FOR, BY PARTNER JOINTLY SUED.** Under the provisions of the code in an action against two defendants, the evidence being ample as to one, but insufficient as to the other defendant, the verdict and judgment should be against the one and for the other; and in such case where the verdict was against both defendants, and the one against whom there was insufficient (or no) evidence made no motion for a new trial, as to himself alone, and judgment was rendered against both, it will not be disturbed. *Long & Smith v. Clapp*, 15 Neb., 417.

ERROR to the district court for Cuming county. Tried below before CRAWFORD, J.

*T. M. Franse*, for plaintiffs in error.

*M. McLaughlin* and *W. F. Bryant*, for defendant in error.

COBB, J.

The defendants in error sued the plaintiffs in error in the district court for certain scandalous and defamatory

19	739
23	709
24	230
24	304
19	739
25	408
19	739
33	93
19	739
28	832
19	739
39	445
19	739
40	261
41	582
19	739
44	209
19	739
47	374
48	147
19	739
53	481
19	739
59	718

words spoken by the plaintiff in error, Hannah Boldt, of and concerning the defendant in error, Caroline Budwig. The defendants in error as well as the plaintiffs in error are severally husband and wife.

The petition was in the ordinary form of a petition in slander, charging that Hannah Boldt had spoken certain false slanders and defamatory words of and concerning Caroline Budwig to the damage of the plaintiffs; that the plaintiffs were then and there husband and wife, and that the defendants were then and there husband and wife. The defendant William Boldt demurred to the petition; the defendant Caroline Boldt answered, denying the speaking of the slanderous words. The court overruled the demurrer of William Boldt; whereupon he filed his answer to said petition denying the allegations thereof, except that of the marriage of the parties, plaintiff and defendant. There was a trial to a jury, with verdict and judgment for the plaintiffs.

The defendants William Boldt and Hannah Boldt filed a joint motion for a new trial, which was overruled, and thereupon they filed a joint petition in error in this court.

The following are the errors assigned:

1. In overruling the defendant William Boldt's demurrer to the petition.
2. In overruling defendant William Boldt's objection to the introduction of any testimony.
3. In overruling the defendants' objection to the introduction of any testimony.
4. In admitting the testimony of Henry Calland and in not striking it out at defendant's motion.
5. In giving paragraphs 7, 8, 9, and 12 of the instructions given by the court on its own motion.
6. In refusing to give paragraph two of instructions asked by defendants.
7. In rendering judgment on said verdict against the defendants jointly and against the defendant William Boldt.



8. In overruling defendants' motion for a new trial.

It will be observed that the plaintiffs in error scarcely complain of the judgment as against the defendant Hannah Boldt. I will, however, examine those assignments in which the alleged error might be deemed to apply to both defendants. First, as to the third assignment. The method of raising objections to pleadings by objecting to the introduction of any testimony, on the ground that the facts alleged in the petition are not sufficient to constitute a cause of action, or, as it is usually expressed, that the petition does not state a cause of action, is one not very clearly defined in the books or cases. The rule is stated by the supreme court of Wisconsin as follows: "Where a complaint fails to state a cause of action, and the defendant at the trial objects on that ground to the introduction of any evidence, such objection is equivalent to a general demurrer, and a judgment for the plaintiff must be reversed." *Hays v. Lewis*, 17 Wis., 217. Assuming this rule to be correct, let us apply it to the case at bar. It is not contended, nor could it be, that the petition does not state a cause of action by Caroline Budwig against Hannah Boldt, but it is contended that Gottfried Budwig was improperly joined as a plaintiff, and that William Boldt was improperly joined as a defendant. Neither one of these questions could be reached by a general demurrer. This designation is applied by the courts to a demurrer for the *sixth* or last ground of demurrer stated in the code, to-wit: "That the petition does not state facts sufficient to constitute a cause of action." The *fourth* ground of demurrer as set out in the code is "That there is a defect of parties plaintiff or defendant." Code, § 94. This is designated special demurrer, and its place would not be supplied by an objection to the reception of any testimony. There was a demurrer by William Boldt, severally, among the grounds of which were "a defect of parties plaintiff," and "a defect of parties defendant." The word *defect* is defined by

Webster to mean "want or absence of something necessary for completeness or perfection." That there are too many plaintiffs or defendants joined in the petition is not made ground of demurrer by our code, nor is that question raised by an objection to the introduction of any testimony for the reason that the petition does not state a cause of action.

The point that the court erred in overruling the demurrer of defendant, William Boldt, cannot be sustained, for the reason that said demurrer did not assign any one of the six grounds of demurrer provided for by the code.

The *fourth* assignment of error is not well taken. The testimony of the witness, Henry Calland, was admissible to prove the presence of the defendant, Hannah Boldt, at the time and place stated in the petition, even if he had not understood a word of that which was spoken by her. That he did not understand the German language was for the consideration of the jury as to the weight to be accorded to his testimony, but did not disqualify him as a witness.

The *fifth* assignment of error is based upon the giving by the court of the 7th, 8th, 9th, and 12th instructions, which are as follows:

"7. The plaintiffs are not bound to prove the speaking of all the words charged in the petition. If the jury believe from the evidence that the defendant, Hannah Boldt, spoke of and concerning the plaintiff, Caroline Budwig, in the presence and hearing of others, any of the slanderous words charged in the petition, the fair import of which would be to charge the plaintiff, Caroline Budwig, with being a whore, then she is entitled to a verdict.

"8. You are further instructed that anger is no justification for the use of slanderous words, and it ought not to be considered even in mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used, and in this case, if the jury be-

believe from the evidence that the defendant, Hannah Boldt, spoke of the plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation, and that the defendant was angry at the time, unless her anger was wrongfully provoked, in whole or in part, by the acts or language of the plaintiff herself.

"9. The jury are instructed that words charging a woman with being a whore are actionable in themselves, and the law presumes that the party uttering them intended maliciously to injure the person concerning whom they are spoken, unless the contrary appears from the circumstances, occasion, or manner of the speaking of the words; but all the plaintiffs are bound to prove in the case to entitle them to recover, is the speaking by the defendant, Hannah Boldt, of enough of the slanderous words charged in the petition to amount to a charge that the plaintiff, Caroline Budwig, was a whore; and express malice or ill will need not be proved. But, if the jury believe from the evidence that plaintiffs have failed to prove enough of the words to amount to a charge that plaintiff was a whore, then plaintiffs cannot recover, and your verdict should be for the defendant.

"12. If, from the evidence and the instructions of the court, the jury find for the plaintiffs, then the jury are to determine from all the evidence and the circumstances as proved on the trial, what damages ought to be given to the plaintiffs, and find your verdict accordingly, but not exceeding the amount claimed. In finding the measure of damages, the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, Caroline Budwig, and the present or probable future injury, if any, to the plaintiff, Caroline Budwig's character, which the uttering of the words was calculated to inflict. If you find for the plaintiff she will be entitled to at least nominal damages without proof of actual damages."

Aside from the point made by counsel for plaintiffs in error in the brief, that these instructions were erroneous, in that the jury were told therein in substance, that if they should find from the evidence that the defendant, Hannah Boldt, spoke certain slanderous words of and concerning the plaintiff, Caroline Budwig, then that the plaintiffs—both plaintiffs jointly could recover, which point will be noticed hereafter. I do not see any error in the instructions, although it must be admitted that the 12th is not very carefully drawn. Instruction No. 8 is not, nor does it purport to be, perfect or syllogistic in its terms, but so far as it goes, I think it unobjectionable. As will be seen hereafter, it is not necessary to decide—nor do I decide—in disposing of these instructions, whether, under the law as it now stands, a husband is liable for slanderous words spoken by his wife or not. The instructions are clearly right so far as the question of the measure of damages is concerned. The words charged in the petition are actionable *per se*; hence there not only need be no proof of special damages, but such proof would be inadmissible. No witness could swear to the mental suffering of the female plaintiff. The jury must decide upon that from the defamatory words themselves, and the sex, age, and condition of the plaintiff. So also as to the question of future damage. No human being could say that the plaintiff's life would be prolonged for a single day after the trial, and yet the jury should consider the damage to her character as well as her mental suffering caused thereby during a life to be prolonged for the usual period of expectation according to ordinary experience, and not according to the opinion or testimony of witnesses. So the objection that there was no evidence before the jury of the mental suffering of the plaintiff, or of future damage, and hence that the instructions as to those matters were not supported by the evidence, is not well taken.

Plaintiffs in error assign as error the refusal by the court

to give in charge to the jury the second of the instructions prayed by them. The following is the instruction refused: "If you believe from the evidence that the defendant Hannah Boldt uttered of and concerning the plaintiff Caroline Budwig the slanderous words charged in the petition, then and in that event you will find for the plaintiffs, and the plaintiffs will be entitled to nominal damages in any event, together with such punitive or exemplary damages or smart money as in your judgment may be proper, as a punishment of the said defendant and an example to others." This instruction was not only properly refused, but its refusal was favorable to the plaintiffs in error; so that even if wrong, they could not be heard to object. But, as was held by this court in the case of *Boyer v. Barr*, 8 Neb., 68, punitive damages are not given in this state in any class of cases between private parties. Compensation under the rules of law is all to which a plaintiff is entitled in a civil suit at law. As to what elements of damage will be taken into consideration is a question not now before the court.

The *seventh* and last assignment of error—that the court erred "in rendering judgment on said verdict against the defendants jointly, and against the defendant William Boldt"—must be overruled as the point is here presented, irrespective of the merits of the case had William Boldt moved for a new trial and prosecuted error separate and apart from his co-defendant.

In the case of *Long & Smith v. Clapp*, 15 Neb., 417, upon exhaustive argument and thorough consideration, it was held that (I quote from the syllabus): "Under the provisions of section 429 of the code, in an action against two defendants, \* \* \* the evidence being ample as to one but insufficient as to the other defendant, the verdict and judgment should be against the one and for the other; and in such a case where the verdict was against both defendants, and the one against whom there was but insuffi-

cient evidence made no motion for a new trial as to himself alone, and judgment was rendered against both, it will not be disturbed."

We have thus examined all of the errors assigned by plaintiffs in error, and found against them upon each point; yet the writer does not wish to be understood as holding that the action could not have been successfully prosecuted in the name of Caroline Budwig alone, nor even that her husband was a proper party to the action, but only that neither of those questions was so presented as to necessarily call for a reversal of the judgment. In this connection it may not be amiss to repeat what has often been said by this and other courts, that the judgment of a trial court will be upheld by an appellate one whenever it can be done without violating any principle of law or rule of practice.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

# INDEX.

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**Abandonment.** See HOMESTEAD.

**Abstract.** See COURT—SUPREME.

**Account Books.** See EVIDENCE, 14.

**Account Stated.**

1. Defined. *McKinster v. Hitchcock*..... 100
2. Under facts stated, *Held*, That allegations of fraud contained in answer were sufficient, if proven, to vitiate the account stated, if one existed, and that the question of such fraudulent concealment should be submitted to the jury with other issues in the case. *McKinster v. Hitchcock*..... 100

**Acknowledgment.**

- Defined. *Aultman & Taylor Co. v. Jenkins*..... 211

**Action.** See SPECIFIC TITLES.

- Business tax collected under void ordinance, and paid under protest, may be recovered back. *Caldwell v. City of Lincoln*..... 569

**Action quia timet.**

1. Decree quieting title may be rendered in action for specific performance. *Buns v. Cornelius*..... 108
2. In case stated cloud on title removed. *Schriber v. Platt* 625

**Administration of Estates.**

1. Duty of court to confirm sale made by administrator, under sec. 88, ch. 23, Comp. Stats. *Saxon v. Cain*..... 488
2. When administrator procures an order of sale, accepts such order, makes the sale, reports it to the court, and procures a confirmation thereof, he thereby waives his right to have the order reviewed by proceedings in error. *Saxon v. Cain*..... 489

**Admissions.** See CONFESSIONS. EVIDENCE, 8.

**Agent.** See PRINCIPAL AND AGENT.

**Allegata et Probata.**

- Must agree. *Young v. Filley*..... 543

**Amendment.** See ANSWER. PETITION.

- Of supersedeas bond. *State v. Thiele*..... 220

**Amercement.**

Failure of officer to return writ; question whether debt was collectible, material; measure of damages is actual loss sustained. *Hellman v. Spielman*..... 152

**Answer.**

1. Under a general denial defendant may introduce evidence tending to disprove evidence given by plaintiff. *Broadwater v. Jacoby*..... 77
2. An answer entitled in wrong court may be amended. *McMurtry v. State*..... 147
3. If defect of parties does not appear on face of petition, it must be pleaded in the answer, or it will be waived. *Hall v. Strode*..... 656

**Appeal. See COURT—SUPREME.**

1. Lies only in cases authorized by statute. *State v. Meeker* 450
2. Where transcript shows that the parties were present at the trial, and that the cause was tried, both parties being sworn and examined as witnesses, the fact that the defendant was called as a witness for plaintiff will not deprive him of the right of appeal. *Broadwater v. Jacoby*..... 77
3. Failure of plaintiff to prosecute appeal; non-suit held proper. *Jacoby v. Mitchell*..... 537
4. Appellee neglecting to take steps to review decree will not on affirmance be entitled to any greater relief than was awarded him in court below. *Hamilton v. Whitney, Clark & Co.*..... 303
5. Finding of court entitled to same respect in supreme court on appeal as verdict. *McLaughlin v. Sandusky*, 17 Neb., 110. *Roggencamp v. Seeley*..... 170
6. Error must appear affirmatively. *Weir v. B. & M. E. R. Co.*..... 212
7. Party not deprived of right of appeal by reason of judge holding bill of exceptions and signing after time up. *Parker v. Kuhn*..... 394

**Assignment for Creditors.**

1. Question of fraudulent intent in assignment is one of fact. *Grimes v. Farrington*..... 44
2. Debtor has the right to prefer creditors. *Id.*..... 45
3. Debtor may prefer creditors by giving chattel mortgage. *Ahlman v. Meyer & Schurman*..... 65
4. Act requiring record of assignment, within twenty-four hours after its execution, construed, and word "execution" Held, To include delivery of assignment and surrender of control over it. *Wells v. Lamb*..... 355



**Attachment.**

1. A mortgagor has the right to resist an attachment issued against him by motion to discharge the same. *Grimes v. Farrington*..... 45
2. On motion, where it appeared that one conveyance alleged to be fraudulent was so, and another conveyance of a different tract of land was good, an order of the district court discharging an attachment issued in the cause was reversed. *Washburn v. McGuire*..... 98

**Attorney.**

1. Privileged communications as evidence. *Brigham v. McDowell*..... 407
2. Under facts stated, *Held*, That relation of attorney and client did not exist, and statements made to attorney with reference to facts in another case was not a privileged communication. *Clay v. Tyson*..... 530
3. Unlawful conduct in procuring release of a person convicted and imprisoned under state law; allegations of information. *State v. Burr*..... 593
4. Sec. 5, ch. 7, Comp. Stats., construed. *Id.*..... 593
5. Revocation of license to practice; jurisdiction of supreme court; duties of attorney; practicing deceit; removal from office; case stated. *State v. Burr*..... 593
6. Assignment of judgment to; action by third party; construction of pleadings. *Hall v. Strode*..... 658
7. Attorney's fee on foreclosure of tax lien. *Toule v. Shelley* 632

**Bastardy.**

1. Mere presence of alleged bastard at the trial, *Held*, Not improper. *Hutchinson v. State*..... 263
2. Omission to enter plea of reputed father before empanelling of jury not ground for new trial. *Id.*..... 263
3. No pleadings necessary except those specified in ch. 37, Comp. Stat. *Id.*..... 263
4. Not error to refuse to allow cross-examination of prosecutrix as to what she testified to in her examination before the magistrate before whom the proceeding was instituted, her examination before the magistrate being certified up. *Masters v. Marsh*..... 458
5. Not error for court to sustain objection to the question put to her on cross-examination in the following words: "Didn't you have intercourse with \* \* \* there in that house about that time?"—the time referred to being shown by the context to be about nineteen months before the birth of the child. *Id.*..... 458

**Bill of Discovery.** See CREDITOR'S BILL.

**Bill of Exceptions.**

1. Must contain affidavits. *McMurtry v. State*..... 147  
*Jacoby v. Mitchel*..... 537
2. Held by trial judge and signed after time up; appellant not deprived of his right of appeal. *Parker v. Kuhn*..... 394

**Bona Fide Purchaser.**

- Hoyt v. Schuyler*..... 653

**Bonds.**

- Of cities of second class to aid internal improvements; certification by state officers. *State v. Babcock*..... 223, 230

**Bonds—Official and Statutory.**

1. Liquor dealer's bond given to municipality where license is granted, instead of to the State, Held, good. *Thomas v. Hinkley*..... 324
2. Supersedeas bond on appeal from decree of foreclosure must contain conditions prescribed by law. *State v. Thiele*, 220
3. Supersedeas bond may be amended. *Id*..... 220

**Cities of Second Class.**

1. May impose an occupation tax upon liquor dealers in addition to tax for license to sell; the payment of such tax, however, cannot be made a condition precedent to the issuing of license to sell intoxicating liquor. *State v. Bennett* ..... 191
2. Voting aid to railroad; construction of statute. *State, ex rel. City of Lincoln, v. Babcock*..... 223, 230
3. Where at time of election of officers no salary is fixed, an ordinance passed afterwards, fixing salary, is good. *State v. McDowell*..... 442

**Cities of Second Class and Villages.**

1. When a village contains more than one thousand and less than twenty-five thousand inhabitants, it is the duty of the board of trustees to divide it into not less than two wards, and call an election at the proper time, for the purpose of electing such officers as the statute requires to be elected in a city of the second class. *State v. Holden*..... 249
2. A general law creating cities of the second class need not be accepted by the municipalities named to make it operative upon them. *Id*..... 249
3. Procedure where a city of the second class containing more than 1,500 inhabitants desires to adopt village government. *Id*..... 249

**Cloud on Title.** See ACTION QUIA TIMET.

**Complaint.** See CRIMINAL LAW.

**Confessions.**

1. Voluntary admissions of accused while in custody. *Ballard v. State*..... 609

**Confirmation of Sale.** See JUDICIAL SALE.

**Consideration.** See FRAUD. HUSBAND AND WIFE, 6

**Constitutional Law.**

1. When the title to an act contains but one subject which is the principal or leading part of the act, and another subject is included in the act but not mentioned in the title, the title and subject matter therein contained, which is included in the act will be sustained, while that part of the act not mentioned in the title will be held invalid, if it is apparent that the second was not an inducement to the legislature to pass the first, so that for the second part it would not have passed the act. *State v. Hurds*..... 317
2. When constitutional provision imposes a duty upon an officer, no legislation is necessary to require the performance of such duty. *State v. Babcock*..... 239
3. Authority of city in issuance of bonds to aid works of internal improvement. *State v. Babcock*..... 223, 230
4. City ordinance passed during term of non-salaried office, fixing salary, is not unconstitutional. *State v. McDowell*... 442

**Contempt.**

1. Proceeding is criminal in its nature and subject to strict rules of construction. *Boyd v. State*..... 128
2. Violation of order of injunction by one not a party, or a subordinate, is not contempt. *Id*..... 128
3. A respondent in mandamus cases failing to pay judgment for costs is not in contempt of court. *State v. Jaynes*..... 697

**Continuance.**

1. Where material testimony is suppressed, without which the party in whose favor it was taken cannot safely proceed to trial, court will grant a continuance. *Spielman v. Flynn*..... 342

**Contract.**

1. If evidence tends to show rescission, and instructions be given to jury which ignore it, new trial will be granted, although in former instructions the court had properly charged jury upon the law of rescission and its application. *McPherson v. Wiswell*..... 117
2. Contract to dig well; conditions stated; defendant held to have waived provisions of contract in regard to measurements of water. *Woodworth v. Hammond* ..... 215

3. Damages for withdrawing cattle from herd of plaintiff during the herding season; contract construed and, *Held*, Error on part of the court to refuse instructions as to the rights of defendant to remove his cattle. *Skinner v. Majors* ..... 453
4. Damages for breach of contract in construction of skating rink; trial to jury; verdict not disturbed. *Meyer v. Wilkie* ..... 510
5. Agreement between partners for sale of interest of one partner and interest in leasehold premises, *Held*, To constitute one contract. *Connor v. Hingtgen* ..... 472
6. Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or execution of deed for real estate, equity may relieve against the same on the ground of undue influence. *Munson v. Carter* ..... 293
7. Letting public contracts. *State v. Saline county* ..... 253

#### Conversion.

1. Jurisdiction of justice. *Spielman v. Flynn* ..... 344
2. The wrongful taking of property and appropriating the same to the party's own use constitutes conversion. *Stough v. Stefani* ..... 468
3. Action for, may be maintained for taking property intended for another, but before being accepted by such other party. *Stough v. Stefani* ..... 468

#### Conveyance. See DEED. MORTGAGE.

#### Corporations.

1. Foreign corporation having no property of debtor in this state, nor owing money to him payable therein, not subject to garnishment. *Wright v. C. B. & Q. R. R. Co.* ..... 175

#### Corporations—Municipal.

1. A general law creating cities need not be accepted by municipalities to make it operative. *State v. Holden* ..... 249
2. In action to recover damages for injuries caused by a defective sidewalk, where proof shows that sidewalk was defective at the time of the injury and had been so for a long time prior thereto, of which defect the street commissioner had actual notice, and that such defect caused the injury, the verdict will not be set aside as being against the weight of evidence. *City of Lincoln v. Woodward* ..... 259
3. Damages from defective cross-walks; plaintiff must prove that defect existed in original construction; that defendant had notice of defect or facts from which notice would be inferred, or circumstances from which it appears

- that defect ought to have been known. *City of York v. Spellman*..... 357
4. On facts stated, *Held*, That trial court erred in withdrawing from jury testimony of witness as to the dimensions of the wooden structure of the cross-walk alleged to have been the cause of the injury, as ascertained by measurement two years after the date of the injury. *Id.* 357
  5. Where at time of city election of officers no salary is fixed, an ordinance passed during their terms fixing salaries is constitutional. *State v. McDowell*..... 442
  6. Under subdivision 28, sec. 69, ch. 14, Comp. Stat., assessors of damages caused by reason of opening streets, should be elected by vote of electors, and not named in ordinance. *U. P. R. R. Co. v. B. & M. R. R. Co.*..... 386
  7. Authority to issue bonds for aid to internal improvements; certification by state officers; construction of statute; duty of auditor and secretary of state. *State v. Babcock*..... 223, 230

**Costs.** See FEES.

1. In mandamus cases, can only be collected by execution. *State v. Jaynes*..... 697

**Counties.**

1. Attaching unorganized to organized county; organization of new county from the unorganized county prior to taxes becoming due; taxes to be paid to treasurer of new county. *Morse v. Hitchcock County*..... 566
2. Under sec. 149, ch. 18, Comp. Stat., it is the duty of county board after due notice to let the contract to the lowest bidder that can give adequate security for the performance of the agreement, and there is no authority to let such contracts in any other way. *State v. Saline County*..... 253
3. The board may reject all bids for such supplies; but upon doing so it is its duty to again advertise for the furnishing of supplies. *Id.*..... 253
4. In the absence of fraud, where the board rejects all bids, the lowest bidder cannot compel the awarding of the contract to himself. *Id.*..... 253
5. Where county board invite and accept bids for poor farm, vendors may enforce specific performance of contract against county. *Davey v. Dakota County*..... 722
6. County board may fill vacancies in county offices. Word "suspended" in sec. 9, Art. 2, Ch. 18, Comp. Stat., not synonymous with word "removed" in sec. 1, same article. *State v. Meeker*..... 444
7. County commissioner must reside in district from which

- he was elected; removal therefrom vacates the office. *State v. Skirving*..... 497
8. Vacancy in office of county commissioner more than thirty days before election is to be filled thereat, failure of clerk to call attention to such vacancy in election notice will not invalidate the election. *Id.*..... 497

### Courts.

1. Remarks by judge as to falsity of affidavit for continuance, *Held*, Error, and a new trial granted. *Bowman v. State*... 523

### Courts—County.

1. Setting aside judgment under provisions of sec. 1001 of civil code; practice, notice to plaintiff of application. *Toole, Hosea & Co. v. Jones*..... 588
2. County courts have no jurisdiction under sec. 34, Ch. 28, Comp. Stats. for the taking of illegal fees by officers. *Crow v. Bowen*..... 528
3. Have jurisdiction in complaints for misdemeanor. *Ex parte Maule*..... 273
4. Have jurisdiction to revive judgment. *Dennis v. Omaha Nat. Bank*..... 675

### Court—Supreme.

1. An appellee who has taken no steps to have a decree reviewed will not on the affirmance of the judgment in the supreme court be entitled to any greater relief than was awarded to him in the court below. *Hamilton v. Whitney, Clark & Co.*..... 303
2. In proceedings in error to review a judgment of the district court, whereby the value of improvements, rents, and profits, and of the real estate, was found upon appraisal, the supreme court has no authority to order a reference for the purpose of ascertaining the value of rents and profits accruing after the verdict or assessment of the appraisers and during the pendency of the proceedings in the supreme court. *B. & M. R. E. Co. v. Dobson*..... 451
3. The evidence upon the sole question of fact at issue being contradictory, and nearly equally balanced, the finding and judgment of the trial court will be upheld. *Traphagen v. Sheldon*..... 75
4. Under act of 1885, requiring abstracts of causes, the court in its examination of the case, will not look beyond the abstract. *Ballard v. Cheney*..... 58
5. Error must appear affirmatively. *Weir v. B. & M. R. E. Co.*..... 214
6. Record imperfect, judgment affirmed. *Id.*..... 215

7. An error in favor of plaintiff in error is not cause for reversing judgment. *Stough v. Stefani*..... 468
8. Error without prejudice; judgment not reversed. *Clay v. Tyson*..... 531
9. Cause remanded with directions to ascertain the value of permanent improvements. *Shuman v. Willets*..... 705

**Creditor's Bill.**

1. Petition examined and *Held*, To state a cause of action. *Hicks & Miller Tea Co. v. Mack*..... 339

**Criminal Law.**

1. Complaint charging misdemeanor is good if it contains sufficient to show violation of law. *Ex parte Maule*..... 273
2. County judge has jurisdiction of complaint for misdemeanor. *Ex parte Maule*..... 273
3. Fraudulent transfer of property; indictment need not charge that act was done with intent to defraud. *State v. Hurds*..... 316
4. An escape is not necessarily an admission of guilt. *Mathews v. State*..... 339
5. Remarks by court as to falsity of affidavit for continuance, *Held*, Error, and a new trial granted. *Bowman v. State*... 523
6. Officer who arrested defendant may testify as to statements made by him while in his custody, if shown to be voluntary, and made without any inducements. *Ballard v. State*..... 609
7. Insanity as a defense; burden of proof. *Ballard v. State*. 610
8. Where an objection to a question is sustained and the testimony excluded, if the witness is afterwards recalled and fully examined upon the matters presented by the former interrogatories the ruling of the court in sustaining the objection, even if erroneous, will not be sufficient cause for reversing a judgment unless it should affirmatively appear that the prisoner was prejudiced thereby. *Ballard v. State* ..... 609
9. In the trial of a criminal prosecution wherein a defendant is arraigned upon *indictment*, the state is not precluded from the examination of witnesses whose names are not endorsed upon the indictment. *Id.*..... 609
10. Endorsement of names of witnesses upon *information*; additional names of witnesses cannot be endorsed during trial. *Sterens v. State* ..... 647
11. Larceny; robbery; person charged with robbery may be convicted of larceny. *Id.*..... 647
12. Motion for a new trial must be filed at term at which verdict is rendered. *Bradshaw v. State*..... 644

13. More than two years after rendition of judgment, prisoner filed motion for a new trial on the ground of newly discovered evidence and supported motion by affidavits; *Held*, That case was properly dismissed. *Bradshaw v. State*. 644
14. Fees of witnesses coming from foreign state, upon conviction of defendant, taxable to defendant. *Reid v. State*. 695

#### Damages. See HERD LAW.

1. Rule of, in cases of amercement. *Hellman v. Spielman*... 152
2. Laying out public road. *Otoe County v. Heye*..... 283
3. Alleged malpractice of physician. *Morrill v. Tegarden*... 534
4. Rule of, in cases of slander. *Boldt v. Budwig*..... 749
5. From defective crosswalk. *City of York v. Spellman*..... 357
6. Caused by opening streets in city; assessors should be elected by vote of electors and not named in ordinance. *U. P. R. R. Co. v. B. & M. R. R. Co.*..... 386
7. For injuries to person. *B. & M. R. R. Co. v. Crockett*... 138  
*City of Lincoln v. Woodward*..... 259
8. Liability of railroad for damages prior to the completion of road. *Hitte v. R. V. R. R. Co.*..... 620
9. In action of replevin where verdict is in favor of defendant whose ownership is special. *Cruts v. Wray*..... 582
10. Breach of contract in case stated. *Meyer v. Wilkie*..... 510
11. For fraudulent representations. *Young v. Filley*..... 544

#### Deceit.

1. Removal from office of attorney-at-law for practicing deceit. *State v. Burr*..... 593

#### Deed.

1. Re-delivery or surrender of deed to the grantor, unaccompanied by purpose of rescinding and annulling contract, does not divest title of the grantee. *Bunz v. Cornelius*..... 108
2. Filed for record in county clerk's office, and duly indexed, is constructive notice of rights of grantee. *Hoyt v. Schuyler*..... 652
3. Quit-claim deed; defective record of prior deed; purchaser under quit-claim not entitled to protection. *Id.*... 652
4. Party claiming title under quit-claim from grantor, who had previously conveyed to another, and the effect of the second deed, if sustained, will be to deprive first grantee of his title, must make a clear case of *bona fides* on his part before his deed will be sustained. *Hoyt v. Schuyler*..... 653
5. At judicial sale. *Lamb v. Sherman*..... 681

#### Default.

1. Pleading properly on file prevents taking of default. *McMurtry v. State*..... 147



**Demurrer.**

1. Admits truth of such facts only as are properly pleaded.  
*State, ex rel. Mechling, v. Jaynes*..... 164
2. Does not lie for misjoinder of parties plaintiff. *Darey v. Dakota County*..... 721
3. That there are too many plaintiffs or defendants joined is not ground of demurrer. *Boldt v. Budwig*..... 739
4. To render demurrer effective one of the causes set forth in the code must be substantially stated. *Id.*..... 739

**Discretion of Court.**

1. In causing prosecutor to elect between counts in indictment. *State v. Lawrence*..... 309

**Divorce.**

1. Under the pleadings, the burden of proof being upon the defendant, and the evidence not being sufficient to sustain a verdict in her favor, the decree thereon will be reversed, and a decree rendered for plaintiff in the supreme court. *Thomas v. Thomas*..... 81
2. Application to modify decree of divorce may be reviewed on error. *O'Brien v. O'Brien*..... 584
3. Court may order alimony where wife seeks modification of decree, alleged to have been obtained by fraud of husband. *Id.*..... 584
4. A divorce procured in Salt Lake City while neither of the parties were residents of that territory is null and void. *Smith v. Smith*..... 706
5. To give the court jurisdiction in an action for divorce, at least one of the parties must be a *bona fide* resident of the state or territory where the action was brought. *Smith v. Smith*..... 706
6. A denial in the language of the petition that the defendant "denies that said marriage was unlawful and wrongful, and denies that he has cohabited with L. W. S., etc., in a state of adultery," is not a denial of the cohabitation. *Smith v. Smith*..... 706
7. Permanent alimony, *Held*, To be excessive, and reduced to \$4,000. *Smith v. Smith*..... 706

**Duress.** See CONTRACT, 6.**Ejectment.**

1. In ejectment by a tenant in common against a person in possession without right, the plaintiff can recover only to the extent of his title. *Mattis v. Boggs*..... 698
2. A petition in ejectment may be amended to be a petition to redeem the land. *McKeighan v. Hopkins*..... 33

3. Judgment for defendant in cause stated upheld. *Hubbart v. Walker*..... 94
- Election.**
1. Essence of. *U. P. R. R. Co. v. B. & M. R. R. Co.*..... 390
  2. Exercise of the right to fill vacancy in an office does not depend on the notice of election, or want of it, by the county clerk, where it seems to have been generally understood by the electors of the county that a vacancy existed. *State v. Skirving*..... 504
  3. Vacancy in office of county commissioner, how filled. *Id.* 497
- Eminent Domain.**
1. Condemnation and appropriation must be *stricti juris*; appraisers must be elected by vote of electors, and not named in ordinance. *U. P. R. R. Co. v. B. & M. R. R. Co.*..... 389
- Equity.**
1. Jurisdiction to relieve against contracts obtained by undue influence. *Munson v. Carter*..... 293
- Error.** See APPEAL. COURT—SUPREME. EVIDENCE, 11.
- Escape.**
1. Not an admission of guilt. *Mathews v. State*..... 330
  2. Issuance of writ of *habeas corpus* by U. S. commissioner, and discharge of prisoner thereunder, is void, and in effect an escape of the prisoner. *State v. Burr*..... 593
- Estoppel.** See GARNISHMENT. RES ADJUDICATA.
1. A party by simply paying attorney for resisting confirmation of sale is not estopped from asserting title to the land. *Schribar v. Platt*..... 630
  2. To be available must be plead. *Schribar v. Platt*..... 629
- Evidence.**
1. Lost papers; evidence of member of law firm after dissolution that he has made search and cannot find them; secondary evidence of contents inadmissible until it be made to appear that he retained possession of the same, and that search was made in such places as papers, if in existence, in all probability would be found. *Post v. School District*.. 135
  2. Before secondary evidence is admissible to prove the existence or contents of a paper claimed to have been attached to and a part of the files of a case in court, it must appear that diligent search has been made in the proper office for such paper, and that it is lost or destroyed and cannot be found. *Murphy v. Lyons*..... 689
  3. The report of the short-hand reporter of a district court of the testimony of a witness examined in such court is not admissible as evidence in a future action between the same

# INDEX.

759

parties as documentary or independent evidence. <i>Lipscomb v. Lyon</i> .....	511
3. A certified copy of the stenographic reporter's record of proceedings is admissible in all cases where original would be; and where parties stipulate that evidence of witness on former trial may be used instead of taking his deposition, the stipulation should be enforced. <i>Spielman v. Flynn</i> .....	342
5. Sec. 394 of the code does not apply to copies of public record open to the inspection of both parties. <i>Id.</i> .....	342
6. Under general denial in an answer defendant may introduce evidence tending to disprove evidence given by plaintiff. <i>Broadwater v. Jacoby</i> .....	77
7. In order to avail himself of error in rejecting evidence, party must have made an offer of testimony clearly indicating what he expects to prove. <i>Lipscomb v. Lyon</i> .....	522
8. Admissions of party can be proved against him only when such admissions are so connected with the main transactions involved in the litigation as to be material to the issue. <i>Hooper v. Browning</i> .....	420
<i>Cummings v. Winters</i> .....	719
9. Where witness is examined in the trial of cause as an expert, and testifies as to his opinions upon scientific questions involved in his profession, it is competent upon cross-examination to inquire as to the extent of his knowledge and familiarity with the accredited standard authors of his profession. <i>Hutchinson v. State</i> .....	263
10. Expert testimony; hypothetical questions, how framed. <i>Morrill v. Tegarden</i> .....	534
<i>Ballard v. State</i> .....	609
11. Erroneously excluding evidence, when error without prejudice. <i>Ballard v. State</i> .....	609
12. Original petition, inconsistent with amended, is competent evidence against party filing it, but weight of such evidence diminished if party verifying it did not understand language in which it was written. <i>Bunz v. Cornelius</i> .....	107
13. In action against railroad for damages occasioned prior to its completion, contract between railroad and contractors engaged in its construction, <i>Held</i> , Properly admissible in evidence. <i>Hille v. R. V. R. R. Co.</i> .....	624
14. Account books admissible in evidence only when they contain charges by one party against another. <i>Masters v. Marsh</i> .....	458
15. In bastardy cases. <i>Hutchinson v. State</i> .....	263
<i>Masters v. Marsh</i> .....	458

- 16. In cases of slander. *Boldt v. Budwig*..... 739
- 17. Privileged communications of attorney. *Brigham v. McDowell*..... 407
- Clay v. Tyson*..... 530
- 18. In cases of rape. *Mathews v. State*..... 330
- 19. Where a question is asked a witness to which objection is made, which is sustained, the party desiring the evidence must offer to prove the facts sought to be introduced in evidence. *Id.*..... 330
- Masters v. Marsh*..... 462

**Exception.** See BILL OF EXCEPTIONS.

**Execution Sale.** See JUDICIAL SALE.

**Exemption.**

- 1. Where a debt was contracted in Iowa, the parties residing there, and a creditor of the debtor not subject to garnishment in that state, the exemption will continue in this state in case an action is brought on the claim. *Wright v. C. B. & Q. R. Co.*..... 175
- 2. Exemption of laborers' wages extends to non-residents. *Id.*..... 175

**Expert Testimony.**

- 1. Hypothetical questions; how framed. *Ballard v. State.* 609
- Morrill v. Tegarden*..... 534

**Fees.**

- 1. County courts have no jurisdiction under sec. 34, ch. 28, Comp. Stats., for the taking of illegal fees by officers. *Crow v. Bowen*..... 528
- 2. Collection of illegal fees is misconduct in office. *Id.*.... 530
- 3. The fees of a witness from another state, coming into this state in obedience to a subpoena issued on behalf of the state in a prosecution for a felony, and where the testimony of such witness is material and necessary, are taxable to a defendant where the prosecution results in a conviction of the defendant of the crime for the commission of which the prosecution was instituted. *Reid v. State*..... 695

**Final Order.**

- 1. Application to modify a decree of divorce is a special proceeding, and may be reviewed on error. *O'Brien v. O'Brien* 584
- 2. Judgment of reversal of justice's judgment is a final order reviewable on error without waiting for trial *de novo* in district court. *Tootle, Hosea & Co. v. Jones*..... 589

**Forcible Entry and Detention.**

- 1. In notice to quit, a description of the land by numbers is sufficient. *Cummings v. Winters*..... 719

**Fraud.**

1. Never presumed, but must be clearly proven; burden of proof upon him who alleges fraud. *Ahlman v. Meyer & Schurman*..... 66
2. Question of fraudulent intent in the transfer or conveyance of property is one of fact. Where, on the hearing of motion to discharge attachment procured upon an allegation of fraud, the averments of such affidavit are denied by the attachment defendant, the burden of proof is upon plaintiff, and motion to discharge should be sustained, unless such proof is made by preponderance of testimony. *Grimes v. Farrington* ..... 44
3. The intent to defraud is a conclusion of law arising from the conduct of the debtor. *McKeighan v. Hopkins*..... 40
4. Principal cannot enjoy fruits of agent's fraud and escape liability. *Id.*..... 38
5. The fact that the value of the property mortgaged is greater than the debt secured is not necessarily an indication of fraud. *Grimes v. Farrington*..... 44
6. Measure of damages resulting from fraudulent representations. *Young v. Filley*..... 544
7. Assignee of a lease for a term of two years, *Held*. Liable for rent of unexpired term. *Devey & Stone v. Payne & Co*. 541
8. Petition examined and, *Held*, To state a cause of action and one which is within the statute of frauds. *Clay v. Tyson* 532
9. Contracts, *Held*, Not within the statute. *Clay v. Tyson* 530
10. Statute of frauds waived by a substantial admission of allegations of petition. *Connor v. Hingtgen*..... 472

**Fraudulent Conveyance.**

1. Exempt homestead cannot be the subject of. *Schriber v. Platt* ..... 631
2. Fraudulent transfer of mortgaged personalty; indictment need not charge that act was done with intent to defraud. *State v. Hurds*..... 317
3. Undue influence exerted upon an uncle by his niece, by reason of which he conveyed to her certain real estate upon a promise to reconvey, may be sufficient to justify a court of equity in setting aside the deed. *Hansen v. Berthelsen* ..... 433
4. Where one of two innocent persons must suffer by the fraud of a third, he who trusted the third person and placed the means in his hands to commit the wrong must bear the loss. *Id.*..... 433
5. While the statute of frauds is so far personal that no one but the parties can in the first instance interpose it, yet when one of the parties conveys real estate absolutely by

warranty deed, and thereby disaffirms the contract, his grantee may plead the facts as a defense. *Id.*..... 434

### Garnishment.

1. Foreign corporation having no property of debtor in this state, nor owing money to him payable therein, not subject to garnishment. *Wright v. C. B. Q. R. E.*..... 175
2. Garnishee claiming that debt sued on is exempt should so plead. *Id.*..... 175  
*Turner v. S. C. & P. E. R.*..... 241
3. Where garnishee has paid money into court, and there is no charge of bad faith in his failing to state in his answer that it was exempt, and debtor has set up claim to the money and judgment has gone against him, debtor is concluded by garnishment proceedings and cannot maintain suit against garnishee. *Turner v. S. C. & P. E. R.*.... 241

### Habeas Corpus.

1. If a mittimus correctly recites the judgment, but commands the jailer to receive the defendant into the cell of the common jail of the county, and there is no allegation in the petition for *habeas corpus* that he is imprisoned in a cell, or otherwise than prisoners are ordinarily confined, a writ of *habeas corpus* will not issue, the confinement not being shown to be illegal. *Ex parte Maule*..... 273
2. U. S. commissioner has no authority to issue writ and discharge from custody of sheriff a person who has been convicted of felony by the courts of the state. *State v. Burr* 593

### Herd Law.

1. Owner has forty-eight hours after notice to pay damages and costs and take the stock away. *Allen v. Van Ostrand*. 578
2. Additional damages cannot be added to damages claimed after service of notice. *Id.*..... 578
3. Replevin of stock taken up under herd law. *Id.*..... 578

### Highways. See ROADS.

### Homestead.

1. Sale of part of a homestead, under facts stated, *Held*, Valid and binding, and grantors compelled to a specific performance. *Bunz v. Cornelius*..... 108
2. Mortgage on homestead of married person must be executed and acknowledged by husband and wife; a mortgage signed by both, but only acknowledged by one, is not a lien on the homestead. *Aultman & Taylor Co. v. Jenkins* 209
3. Where homestead is transferred from husband to wife without consideration, surplus over amount of exemption is liable in her hands for debt of husband. *Hicks & Miller Tea Co. v. Mack*..... 339

4. Cannot be the subject of a fraudulent conveyance. *Schri-bar v. Platt*..... 631
5. Under facts stated, *Held*, That the husband's right of curtesy to homestead was not subject to sale on execution; that there was no abandonment of the homestead. *Den-nis v. Omaha Nat. Bank*..... 675

**Husband and Wife.** See HOMESTEAD.

1. Domicile of wife follows that of husband; proof of domi-cile of husband sufficient *prima facie* to establish that of wife. *Smith v. Smith*..... 706
2. Dealings between husband and wife in relation to wife's separate estate inherited from her father, viewed with sus-picion when lessening security of creditors. *Lipscomb v. Lyon* ..... 511
3. Wife may become creditor of husband. *Id*..... 515
4. Same principles of law apply to dealings with husband and wife as those of strangers. *Id*..... 516
5. Property of wife not liable to levy and sale for debts of husband; purchaser at such sale acquires no title, and is not entitled to possession as against owner or one claiming under her. *Leighton v. Stuart*..... 546
6. Mortgage by wife on her real estate to secure promissory note of husband, *Held*, Under facts stated, that there was sufficient consideration for the mortgage. *Nelson v. Bevins* 715
7. Rights of wife in property belonging to her stated; hus-band not entitled to any compensation for services ren-dered for taking care of wife's separate property. *Broad-water v. Jacoby* ..... 80

**Incest.**

1. Election between two counts charging distinct offenses enforced. *State v. Lawrence*..... 307
2. Not necessary to show cohabitation as husband and wife; sufficient to show sexual intercourse, unduly and licen-tiously, under authority of father. *Id*..... 307

**Indictment.** See INFORMATION.

1. Election may be enforced between two counts charging distinct offenses. *State v. Lawrence* ..... 307
2. Under sec. 9, Ch. 12, Comp. Stat., indictment need not charge that act was done with intent to defraud. *State v. Hurds*..... 317

**Infancy.**

1. Where a female marries while under sixteen, and con-tinues to cohabit with her husband after arriving at that age, her minority ends, and she is legally qualified to con-vey her real estate by deed. *Ward v. Lavery*..... 429

2. A minor who has conveyed his real estate must disaffirm the deed within a reasonable time after coming of age, or be barred of that right. *Id.*..... 429

**Information.** See INDICTMENT.

1. Endorsement of names of witnesses. *Stevens v. State*.... 647

**Injunction.** See EQUIT. .

1. Violation of, by person not party to the order, or a subordinate, is not contempt. *Boyd v. State*..... 128
2. Where parties are all before the court, it is proper for it to consider all the equities of the case and decide as to the rights of all. *Brigham v. McDowell*..... 413
3. Does not lie to restrain erection of grain elevator in street of city under facts stated. *U. P. R. R. Co. v. B. & M. R. R. Co.*..... 391
4. Does not lie to enjoin judgment at law, unless it appears that plaintiff has a valid defense, which by reason of fraud, accident, or circumstances beyond his control, etc., he was unable to avail himself of. *Gould v. Loughran* ..... 392

**Injuries to Person.**

- City of Lincoln v. Woodward*..... 259  
*B. & M. R. R. Co. v. Crockett* ..... 138  
*City of York v. Spellman*..... 357

**Insanity.**

1. Accused relying upon; burden of proof. *Ballard v. State* 610

**Instructions.**

1. Instructions must be construed together, and if when considered as a whole they properly state the law, it is sufficient. *Gray, Burt & Kingman v. Farmer*..... 69
2. Erroneous instructions ground for new trial, although correct instructions on same points had been given. *McPherson v. Wiswell*..... 117
3. Objections to, must be pointed out in motion for new trial. *Weir v. B. & M. R. R. Co.*..... 212
4. Unless instructions asked are applicable to evidence it is not error for the court to refuse the same. *Stough v. Stefani* 468
5. Examined and *Held*, Inapplicable to evidence and erroneous. *City of York v. Spellman*..... 357
6. Under facts stated, *Held*, Error on the part of the court to refuse an instruction giving a fair explanation of the law as to the rights of defendants. *Skinner v. Majors*..... 453
7. Relative to sale or conveyance of personal property examined, and *Held*, Correct. *Lipscomb v. Lyon*..... 514
8. Clerical mistake of clerk in copying; when not ground for reversal. *Ballard v. State*..... 610
9. Should be clear and explicit. *Id.*..... 610



10. Misstatement of law in one paragraph not corrected by correct statement in another. *Id.*..... 610
11. Must be based upon evidence. *Id.*..... 610

**Internal Improvements.**

1. Construction of statute authorizing bonds for works of. *State v. Babcock*..... 230

**Inter-state Law.**

1. Exemption from garnishment of creditor, in state where debt was contracted and parties resided, will be continued here. *Wright v. C., B. & Q. R. E. Co.*..... 175

**Issues. See PLEADING.**

**Judgment.**

1. Judgment rendered in county court, filed in district court Feb. 19th, 1876; in Jan., 1878, debtor and wife conveyed their real estate, deed being acknowledged and recorded May 6th, 1878, *Held*, That the real estate was subject to the lien of the judgment. *Lamb v. Sherman*..... 681
2. Lien of judgment in cause stated, *Held*, Not to exist. *Hubbard v. Walker* ..... 94
3. Judgment lien; action to remove cloud on title in case stated. *Schribar v. Platt*..... 625
4. Transcript of judgment of county court, properly filed and entered on judgment record of district court, creates lien on real estate of debtor, though it may not be entered on general index. *Hamilton v. Whitney, Clark & Co.*..... 303
5. Non-resident heirs, not having actual notice, may, within five years after entry of decree for specific performance of contract of vendor, since deceased, open up judgment and be let in to defend. *In re Reed*..... 397
6. Affidavit of want of notice, by party seeking to open judgment, may be made by attorney. *Id.*..... 398
7. Setting aside judgment of justice of the peace under provisions of sec. 1001, civil code; practice. *Tootle, Hosea & Co. v. Jones*..... 588
8. Assignment of judgment to attorney. *Hall v. Strobe*..... 658

**Judicial Sale.**

1. Statute requiring confirmation should be strictly yet fairly construed. *Schribar v. Platt*..... 629
2. Question of title to real estate is not decided and settled by confirmation. *Id.*..... 630
3. Purchase by appraiser is fraudulent and void. *McKeighan v. Hopkins*..... 34
4. Confirmation of a sale cures all irregularities in the proceedings, but such sale may be afterwards set aside for fraud. *Id.*..... 34

5. Petition in ejectment may be changed to a petition to redeem. *McKeighan v. Hopkins*..... 33
6. Upon an appraisement, appraisers have no authority to consider an adverse claim of title. *McKeighan v. Hopkins* 34
7. Confirmation of administrator's sale. *Sazon v. Cain*..... 488
8. Purchaser upon payment of purchase money and confirmation becomes equitable owner of property and may compel the issuance of a sheriff's deed to himself. *Lamb v. Sherman* ..... 681
9. Imperfect recitals in a sheriff's deed of the facts required by section 500 of the code do not render the deed void. *Id.* 681
10. The power of the court to compel the issuing of a proper deed to a purchaser at execution sale is a continuing one, and is not exhausted by the issue of a defective deed. *Id.*... 681
11. A sheriff's deed for lands sold upon execution relates back to the time such lands became liable to the satisfaction of the judgment. *Id.*..... 681

#### Jurisdiction.

1. Equity jurisdiction to relieve against contracts obtained by undue influence. *Munson v. Carter*..... 293  
*Hansen v. Berthelsen* ..... 436
2. Presumptions are in favor of. *Sazon v. Cain*..... 491
3. U. S. Commissioner has no jurisdiction to issue writ of habeas corpus and discharge from the custody of sheriff, a person who has been convicted of felony by the courts of the state. *State v. Burr*..... 593
4. Proceedings in confirmation and sale not subject to attack collaterally. *Lamb v. Sherman*..... 687
5. The decrees and judgments of a court of general jurisdiction and power are presumed to have been made in causes in which the court had jurisdiction until the contrary is proved. But if it is shown by the record that the court had not acquired jurisdiction over the subject matter or person, such judgment or decree is void, and will be so treated in a proceeding either direct or collateral. *Murphy v. Lyons* 689

#### Jurors.

1. Juror testifying that he resided in neighborhood of one of the parties, had heard a good deal of talk about the case, was not free from bias, etc., *Held*, Incompetent. *Hutchinson v. State*..... 262
2. Unfriendly feeling towards attorney engaged in trial not sufficient ground for challenge for cause. *Id.*..... 262
3. General rules in regard to the selection of, for a trial of cases. *Bowman v. State*.....526-527

**Justice of the Peace.**

1. Has no jurisdiction in actions against officers for misconduct in office. *Crow v. Bowen*..... 529
2. Where amount claimed does not exceed \$200, and action is brought against a sheriff for the value of property sold by him under execution, and there is no charge of misconduct, justice of the peace has jurisdiction. *Spielman v. Flynn*..... 342
3. Judgment of justice, having jurisdiction, rendered after expiration of time, must be corrected by direct proceeding. *Gould v. Loughran* ..... 392
4. Setting aside judgment rendered in absence of defendant under sec. 1001, civil code; order should be made conditional only in the first instance; order cannot be finally made unless conditions are complied with by parties seeking to open judgment; giving of notice is jurisdictional. *Tootle, Hosea & Co. v. Jones*..... 588
5. Appeal to set aside judgment under sec. 1001, civil code, is a recognition of its regularity and a waiver of objection that it was prematurely rendered. *Id*..... 589
6. Judgment of reversal of justice's judgment is a final judgment and reversible by supreme court. *Id*..... 589

**Laborer.**

1. Sixty days' wages exempt. *Wright v. C., B. & Q. R. R.*... 175
- Turner v. S. C. & P. R. R.* ..... 241

**Landlord and Tenant.**

1. If tenant of farm lands, on shares for one year, holds over for another year without new lease, the law implies an agreement to hold on terms of prior lease. *Yates v. Kinney* 275
2. Mortgage of crops by tenant. *Id*..... 275
3. A tenant for two years, of real estate, under a written lease, assigned the same by consent of the lessor, *Held*, That assignee was liable for rent for the whole of the unexpired term, whether he occupied the premises or not. *Dewey & Stone v. Payne & Co*..... 540

**Lands—Public.**

1. Decisions of land officers on matters within their jurisdiction, which are unreversed, cannot be questioned collaterally. *VanSant v. Buller*..... 351
2. In surveys meander lines are generally considered as following windings of streams; question whether they do so or not is a question of fact to be determined by evidence *aliunde*. *Bissel v. Fletcher*..... 725
3. Meander lines along rivers; accretions. *Id*..... 726

**Larceny.**

1. Where a party feloniously took a coat which contained a watch in the pocket, of which he claimed not to be aware at the time of the taking, but which he appropriated, *Held*, That he was liable for all the property taken by him. *Stevens v. State*..... 647

**Lien. See JUDGMENT.**

1. Priority in case stated considered. *Brigham v. McDowell* 408
2. Chattel mortgage on property *in esse* creates no lien against judgment creditor of mortgagor. *Cole v. Kerr*..... 553

**Limitation.**

1. Statute ceases to run when summons which was served on defendant was issued, or if service was constructive, at the date of the first publication of the notice. *McKeighan v. Hopkins*..... 33
2. Payment by taxes collected on school district bonds made within five years next before the commencement of suit thereon, *Held*, Sufficient to take the bonds out of the statute of limitations. *School District v. Bank*..... 90

**Liquors.**

1. General view of the law considered. *State v. Bennett*... 207
2. One who sells or gives away intoxicating drink, which is drank by the buyer or recipient on or about the time of intoxication complained of, is liable for damages sustained. *Kerkow v. Bauer*, 15 Neb., 150. *Elshire v. Schuyler*, Id., 561. *Warrick v. Rounds*, 17 Id., 416. *Roberts v. Taylor*.... 190
3. Cities of second class may impose an occupation tax in addition to tax for license to sell liquors. *State v. Bennett* 191
4. Bond running to municipality instead of to the state, *Held*, Good. *Thomas v. Hinkley*..... 324
5. Filing of bond with clerk and issuing license is sufficient approval, and binding on sureties. *Id*..... 324
6. Recitals in bond binding on sureties. *Id*..... 324
7. Surety signing bonds of two or more dealers is liable on each. *Id*..... 324
8. Provisions of statute directing hearing of remonstrance are mandatory; no authority to issue license until remonstrance is heard. *Vanderlip v. Derby*..... 165
9. Filing remonstrance in office of village clerk is a good filing. *Id*..... 165
10. Remonstrance may be filed at any time before license is granted. *Id*..... 166
11. Allegations of petition in action by wife and minor children against saloon-keeper for loss of means of support examined and *Held*, Good. *Roberts v. Taylor*..... 184

12. Verdict *Held*, Excessive, and plaintiffs allowed to file remittitur. *Id.*..... 184

### Malpractice.

1. Petition examined and *Held*, To state cause of action. *Morrill v. Tegarden*..... 534  
 2. Expert testimony; hypothetical questions, how framed. *Id.*..... 534

### Mandamus.

#### I. GENERALLY:

1. Writ can only require an officer, board, or court to perform a duty which the law enjoins. *Thatcher v. Adams County*..... 485  
 2. Application for, to compel the delivery of dockets, papers, etc., by one claiming to have been elected to office, cause of action consists solely in relator's having been canvassed in, declared elected, awarded a certificate of election, taken the oath, and given the bond required by law, and the respondent having refused or failed to deliver up to him such dockets, papers, etc., on demand. To such application or relation nothing may be properly pleaded in answer which does not deny or put in issue some or all of the above facts. *State, ex rel. Mechling, v. Jaynes*..... 161  
 3. Costs collected only by execution. *State v. Jaynes*..... 697  
 4. Demurrer is the proper course to test sufficiency of petition. *State v. C., St. P., M. & O. R. R.*..... 476  
 5. Motion to quash petition for insufficiency, *Held*, To be a demurrer. *Id.*..... 476  
 6. Action of railway commission must be secured before court will grant mandamus to compel change in the location of a station. *Id.*..... 476

#### II. WRIT LIES:

1. To compel issuance of order of sale in case where no proper supersedeas is on file. *State v. Thiele*..... 220  
 2. To restrain collection of school taxes unauthorized. *Thatcher v. Adams County*..... 485  
 3. To compel payment of school district orders, and the fact that treasurer has otherwise paid out the fund is no defense. *State v. Bloom*..... 565  
 4. At suit of a city to compel certification of bonds legally issued. *State v. Babcock*..... 231  
 5. At suit of tax payer to compel county board to let contract for county supplies to lowest bidder. *State v. Sakine County*..... 253  
 6. To compel an officer removed by county board to surrender his office. *State v. Meeker*..... 444

## III. WRIT DOES NOT LIE:

1. To fix supersedeas bond in mandamus case against street railway to compel it to run cars. *State, ex rel. Omaha Horse Railway, v. Judges*..... 149
2. Where county board rejects all bids at suit of lowest bidder. *State v. Saline County*..... 253

**Married Women.** See HUSBAND AND WIFE.

1. Property rights stated. *Broadwater v. Jacoby*..... 77

**Master and Servant.** See RAILROADS.

1. Sub-boss of gravel train, under orders of conductor, is not a fellow servant of such conductor; railroad liable for death of sub-boss owing to failure of conductor to station watchmen. *B. & M. R. Co. v. Crockett*..... 138

**Mechanic's Lien.**

1. Does not exist until statute complied with; prior thereto mechanic has no such interest in the real estate as would require a relinquishment in writing under the statute of frauds. *White Lake Lumber Co. v. Stone*..... 403
2. Under facts stated, *Held*, That lumber was furnished at the date of the notification of the lumber dealer by the contractor; that he had used said "lumber in the building, and to charge it up." *Marble v. Lumber Co.*..... 732

**Misconduct in Office.**

1. Collection of illegal fees. *Crow v. Bowen*..... 528

**Misdemeanor.**

1. Sufficient if complaint contains sufficient to show violation of law. *Ex parte Maule*..... 273
2. Jurisdiction of county judge. *Id.*..... 273

**Minor.**

1. Marriage of female during non-age. *Ward v. Laverty*... 429
2. Disaffirmance by minor of his deed. *Id.*..... 429

**Mortgage—Chattels.**

1. Chattel mortgage containing a condition, that mortgagor may remain in possession, and continue to sell in the ordinary course of business, is void as to other purchasers in good faith and subsequent creditors. But when the mortgage contains no such conditions, presumption of good faith attaches when the mortgagee is in possession, and the burden of proving fraud is upon him who alleges it. *Ahlman v. Meyer & Schurman*..... 65
2. Whether a chattel mortgage can be attacked collaterally through an agreement, of whatever character, between the mortgagor and mortgagee, prior to or contemporaneous with the execution of the mortgage, *quære*. *Id.*..... 67

3. Chattel mortgage good between the parties; title to the property passes to the mortgagee upon its execution and delivery. *Id.*..... 68
4. Indictment charging fraudulent transfer need not allege intent to defraud. *State v. Hurds*..... 317
5. Mortgage may be void as against *bona fide* creditors or purchasers for defective description, but good as between the immediate parties; as between mortgagor and mortgagee specific description is not essential to the validity of the mortgage. *Leighton v. Stuart*..... 546
6. Mortgage on "75 acres of corn to be planted," Held, To convey no title or lien upon the crop as against a judgment creditor of the mortgagor. *Cole v. Kerr*..... 553
7. Mortgagor may resist attachment. *Grimes v. Farrington* 45

**Mortgage—Real Estate.**

1. Defense of usury available on foreclosure to the maker against an assignee of an usurious note and mortgage transferred to him by written assignment of the mortgage only, for value before maturity and without notice. *Doll v. Hollenbeck*..... 639
2. Mortgagee in possession occupies trust relation in regard to the property, and cannot hold adversely against the mortgagor. *McKeighan v. Hopkins*..... 34
3. On homestead. *Aultman & Taylor Co. v. Jenkins*..... 209
4. The mortgagee of an invalid mortgage is entitled to lien for taxes upon the land paid by him. *Aultman & Taylor Co. v. Jenkins* ..... 212.
5. Tenant on farm leasing on shares may mortgage his share of crop without landlord's consent, and mortgagee will hold title of tenant, subject to rights of landlord. *Yates v. Kinney*..... 275
6. Priority of liens and suit to correct decree considered. *Brigham v. McDowell*..... 408

**Motion.**

1. Duty of court to decide; papers filed after submission of motion, without leave of court or knowledge of judge, will not be considered in reviewing decision on motion. *Jacoby v. Mitchell*..... 538

**Negligence. See INJURIES. RAILROADS.**

1. Defective crosswalks in city. *City of York v. Spellman*... 357

**Negotiable Instruments. See PRINCIPAL AND AGENT.**

1. Where a bank is designated as the place at which a purchase money note is to be paid, the maker is not in default in not paying same until note is received at the bank. *Bal-lard v. Cheney*..... 58

**New Trial. See TRIAL.****Non-suit.**

1. Failure of plaintiff to prosecute appeal to district court by filing petition, etc., *Held*, Not error for district court to non-suit plaintiff and render judgment. *Jacoby v. Mitchell* ..... 537
2. Improper in replevin. *Ahlman v. Meyer & Schurman*... 63

**Occupying Claimants. See COURT—SUPREME.**

1. Cause remanded by supreme court to district court with directions to ascertain the value of permanent improvements. *Shuman v. Willets*..... 705

**Officers.**

1. Filling vacancies in county offices. *State v. Meeker*..... 444
2. Collection of illegal fees by an officer, by virtue of his office, is misconduct. *Crow v. Bowen*..... 530

**Parent and Child.**

1. Bastardy; presence before jury of alleged bastard. *Hutchinson v. State*..... 262

**Parties.**

1. If defect of parties does not appear on face of petition, it must be pleaded in the answer, or it will be waived. *Hall v. Strobe*..... 658
2. That there are too many plaintiffs or defendants joined in a petition is not a ground of demurrer under the code; nor is such question raised by an objection made by the defendant at the trial to the introduction of any testimony for the reason that the petition fails to state a cause of action. *Boldt v. Budwig*..... 739
3. Tenants in common may join as plaintiffs. *Mattis v. Boggs* 701
4. Owners of two tracts of land adjoining, making a joint proposition to sell, which proposition is accepted, may join in an action to enforce the contract. *Davey v. Dakota County* 721

**Partnership.**

1. Agreement between partners for sale of interest of one partner and interest in leasehold premises, *Held*, To constitute one contract. *Connor v. Hingtgen*..... 472
2. When a firm or partnership is engaged in business, and services are rendered by them for another upon request, although outside of their regular business, by which such other is benefited and the firm is damaged, such firm can recover the amount due them by action in their partnership name. *Tiernan v. Doran & Holmes*..... 492

**Payment.**

1. Where a bank is designated as the place at which a purchase money note is to be paid, the maker is not in default



in not paying same until the note is received at the bank.

*Ballard v. Cheney*..... 58

**Pendente lite.**

1. Where a person purchases real estate while an action is pending to subject the property to the payment of a certain debt, the purchaser is chargeable with notice of the claim, and whatever the form of the decree under the issue made by the pleadings, takes subject to the same. *Nelson v. Bevins* 716

**Personal Injuries.** See INJURIES.

**Petition.**

1. Petition may be amended when proposed amendment does not change plaintiff's claim, although the form of action may be changed. Petition in ejectment may be amended to be a petition to redeem. *McKeighan v. Hopkins*..... 33
2. Where the conditions of the contract sued on have been altered by consent of the parties, the contract, as modified, should be set out in the petition, and not in the reply. *Evarts v. Smucker*..... 41
3. Petition may be amended after verdict to conform to facts proved, where evidence is received without objection. *Id.* 41
4. Where objection is made on trial of a case for the first time, that petition does not state facts sufficient to constitute a cause of action, the court should, if possible, sustain the petition, or permit an amendment thereto to be made instantar. *Roberts v. Taylor*..... 184
5. For alleged malpractice, examined and held to state a cause of action. *Morrill v. Tegarden*..... 534

**Physicians.**

Damages for alleged malpractice; evidence. *Morrill v. Tegarden*..... 534

**Pleading.**

1. A pleading filed in district court, but entitled "in county court," is amendable. *McMurtry v. State*..... 147
2. Issues raised by pleadings in case stated examined. *Hall v. Strobe*..... 658
3. In cases of bastardy. *Hutchinson v. State*..... 263

**Practice in Supreme Court.** See COURT—SUPREME.

**Presumptions.**

1. Are in favor of the regularity of the proceeding of courts established by law in matters over which they have jurisdiction. *Van Sant v. Butler* ..... 351
2. Are in favor of the correctness of decisions of courts of general jurisdiction until the contrary is made affirmatively to appear. *Saxon v. Cain*..... 488

**Principal and Agent.**

1. Principal cannot retain benefits derived from fraudulent conduct of agent without being chargeable with the instrumentalities employed to effect the purpose. *McKeighan v. Hopkins* ..... 33
2. Principal will not be permitted to accept and confirm so much of a contract made by an agent as he thinks beneficial to him, and reject the remainder. *Id.* ..... 38
3. Principal bound by acts of agent; acts constituting general agent as to third parties construed, and *Held*, No error for trial court to refuse admission of testimony to prove want of authority of agent, it being conceded that third party had no knowledge of the absence of such authority. *White Lake Lumber Co. v. Stone* ..... 402
4. In an action against a third person on a simple non-negotiable contract, it being alleged in the petition that one of the parties to the contract acted as the agent of the defendant in making said contract, although he did not sign the same as agent or name the defendant as his principal, evidence will be received to show that such nominal party to the contract was authorized to make the same for the defendant, that he in fact did make the same for him, and upon such proof the defendant will be held. *Webster v. Wray* ..... 558
5. No party can be charged as principal upon a negotiable note or bill of exchange unless his name is thereon disclosed. *Id.* ..... 558
6. Exception to the rule in case of bank officers and clerks in banking houses stated. *Id.* ..... 558

**Principal and Surety.**

1. Liability of surety on bond of liquor seller. *Thomas v. Hinkley* ..... 324

**Privileged Communications. See ATTORNEY.****Question for Jury.**

1. Alleged fraudulent concealment of account. *McKinster v. Hitchcock* ..... 100

**Quieting Title. See ACTION QUIA TIMET.****Quit-claim Deed. See DEED.****Railroads.**

1. Sub-boss, acting under orders of conductor to dig out car covered by a fall of gravel from high bank, was killed by embankment caving in. Railroad *Held* Liable. *B. & M. E. R. Co. v. Crockett* ..... 138
2. A railroad company which has entered into an agreement with a contractor to build a portion of its railroad,

and whose locomotives, cars, etc., used in such construction are run exclusively under the direction and control of the contractor, will not be liable for damages occasioned, prior to the completion of the road, by reason of the negligence of the persons running such locomotives and cars. *Hille v. R. V. B. R. Co.*..... 620

3. Mandamus to compel a change, addition, or erection of a station does not lie until action of railroad commission. *State v. C., St. P., M. & O. R. R.*..... 476
4. Voting of aid to. *State v. Babcock*..... 223, 230

**Rape.**

1. Where accused testifies and explicitly denies accusation, there must be testimony corroborating prosecutrix to warrant a conviction. *Mathews v. State*..... 330
2. Testimony must show that prosecutrix resisted to the extent of her ability. *Id.*..... 330
3. In a prosecution for an assault with an intent to commit a rape, an instruction that "there must be an assault and also an accompanying intent, and this intent may be gathered or inferred from any circumstances attending the commission of the alleged crime tending in any manner to show such intent in the mind of the defendant at the time," is erroneous. *Krum v. State*..... 728
4. To warrant a conviction in such case the circumstances, when taken together, must be of so conclusive a nature as to show the intent beyond a reasonable doubt. *Id.*..... 728

**Records.**

1. The record known as the Fee Book, kept by the clerk of the district court, is a public record, and any person interested in the examination of a public record may do so free of charge. *State v. Meeker*..... 106
2. Of deed. *Hoyt v. Schuyler*..... 652

**Referee.**

1. The findings of a referee, like the verdict of a jury, will not be set aside unless they are clearly wrong. *State v. Bennett*..... 191
2. A conclusion of law of referee, even if erroneous, upon an immaterial or unimportant question in the case, will not vitiate his report or require it to be set aside by the court to which it is returned, if the findings and conclusions are in other respects correct. *Yates v. Kinney*..... 275
3. Cause will not be referred in supreme court for the purpose of ascertaining rents and profits accruing after verdict and during pendency of proceedings in supreme court. *B. & M. R. R. Co. v. Dobson*..... 451

**Remittitur.**

1. Of judgment allowed in supreme court. *Roberts v. Taylor* 184  
*Cruts v. Wray* ..... 53  
*Marble v. Lumber Co.*..... 738

**Removal from Office.**

1. Mandamus lies to compel surrender of office. *State v. Meeker*..... 444
2. Judgment not stayed by filing supersedeas bond. *Id.*... 444
3. Of an attorney-at-law in case stated. *State v. Burr*..... 593

**Rents and Profits. See COURT—SUPREME.****Replevin.**

1. Non-suit improper; but in case plaintiff fails to prove his cause of action, court should retain cause for proper proof and judgment. *Ahlman v. Meyer & Schurman*..... 63
2. Where judgment is in favor of defendant having special ownership, measure of damages, in case a return cannot be had, is amount due him on his lien, if within the value of property; but such damages should in no case exceed the value of the property. *Cruts v. Wray*..... 582
3. Of stock taken up under herd law. *Allen v. VanOstrand*.. 578

**Res adjudicata.**

1. In order to constitute a former adjudication which can be pleaded in bar of a recovery, the judgment pleaded must be in an action between the same parties, or their privies, and upon the same subject matter as the cause in which the defense is presented. *Brigham v. McDowell*..... 407
2. A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed or affirmed or to be modified or overruled according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart nor the parties release themselves. *Hiatt v. Brooks*, 17 Neb., 33. *Leighton v. Stuart*..... 546
3. A party, by simply paying attorney for resisting confirmation of sale, is not estopped from asserting title to the land. *Schriber v. Platt*..... 630
4. Matters that have been adjudicated in a former suit will not be considered in a second action. *Nelson v. Bevins*..... 714

**Revivor.**

1. In county court. *Dennis v. Omaha National Bank*..... 675

**Roads.**

1. In laying out public road proximity of railway which might cause teams to run away and injure owner's crops,

etc., not legitimate element of damages. *Otoe County v. Heye* ..... 289

2. Jury should be instructed as to elements of damages. *Id.* 289

**Riparian Rights.**

1. Where there is a strip of land between the back of the river and the meander line, an entry of government land bounded by the meander line will not include such strip. *Bissell v. Fletcher* ..... 726

2. Where lands had formerly extended to the meander line and the testimony showed that there had been a change in the channel of a river of about three-fourths of a mile, but no accretion to the plaintiff's land, *Held*, That the boundaries of his land did not extend to the new channel nor beyond the meander line. *Bissell v. Fletcher*..... 726

**Robbery.**

1. To constitute robbery the property must be taken by force or violence, and with the intent to rob or steal. *Stevens v. State*..... 647

2. A person charged in an information with robbery may be convicted of larceny, as the greater includes the less offense. *Stevens v. State*..... 647

**Sale.** See WARRANTY.

**Schools.**

1. Where the execution and validity of certain school bonds were denied, *Held*, That unless there was some proof of their issue, sale, or ratification by the district, the court should direct a verdict for the defendant. *Post v. School District* ..... 135

2. Under facts stated, *Held*, That school district bonds were valid. *School District v. Bank*..... 89

3. The signature of an officer to school district bonds will be presumed to have been made after his appointment, notwithstanding the date of the bonds. *Id.*..... 89

4. Payment by taxes collected, on school district bonds, made within five years next before the commencement of suit thereon, *Held*, Sufficient to take the bonds out of the Statute of Limitations. *School District v. Bank*..... 90

5. Bonds of district; subdivision into other districts after bonds issued; tax must be levied on property of original district sufficient to pay indebtedness; taxes on real estate not a part of district, and taxes on personal property outside of district, are unauthorized. *Thatcher v. Adams County* 485

6. Injunction to restrain collection of such taxes, lies. *Id.*... 485

7. Teacher's certificate properly endorsed is good in another county. *State v. Grosvenor* ..... 494

8. Certificate cannot be attacked collaterally. *Id.*..... 494
9. Treasurer cannot refuse to pay warrant for teacher's wages upon the ground that endorsement on certificate is invalid. *Id.*..... 494
10. Money can be drawn from the treasury of school district only by orders on treasurer signed by director and countersigned by moderator. *State v. Bloom.*..... 562
11. The provisions of sec. 11, subdivision 3, Chap. 79, Comp. Stats., do not prevent a party, in a proper case, from bringing an action of mandamus in his own name. *Id.*..... 565

#### Service by Publication. See SUMMONS.

1. Affidavit for service by publication is a jurisdictional matter. *Murphy v. Lyons.*..... 692

#### Sheriff.

1. Failure to return writ; amercement; damages. *Hellman v. Spielman.*..... 152
2. Action against, for conversion of property; jurisdiction of justice. *Spielman v. Flynn.*..... 342

#### Slander.

1. Where words set out in the petition are actionable *per se* no evidence need be given of actual damage to the character, nor of the mental suffering of the plaintiff. *Boldt v. Budwig* ..... 739
2. Instructions concerning evidence considered and sustained. *Boldt v. Budwig.*..... 742

#### Specific Performance.

1. In case stated. *Roggencamp v. Seeley.*..... 170
2. Payment of note at bank *Held*, Sufficient, and plaintiff entitled to performance of contract. *Ballard v. Cheney.*..... 58
3. Case stated and purchaser *Held*, Entitled to deed of the land purchased. *Bunz v. Cornelius.*..... 108
4. In an action of specific performance, where the prayer of the petition is for general relief, *Held*, That if a proper relief would be a decree quieting the title of plaintiff, such decree should be entered as would protect him, subject, however, to the payment of any unpaid part of the purchase money, and of taxes paid by defendant, as accrued liens after the execution and delivery of the deed. *Bunz v. Cornelius.*..... 108
5. Where county board invite and accept bids for poor farm, vendors may enforce specific performance of contract against county. *Davey v. Dakota County.*..... 722

#### Statutes.

1. General rule of construction. *State v. Lawrence.*..... 309

2. General rule in construing remedial statutes. *Wright v. C. B. v. Q. R. R. Co.*..... 175
3. Word "execution" in sec. 6, Ch. 6, Comp. Stat., construed. *Wells v. Lamb.*..... 359

**Statute of Frauds.** See FRAUDS.

**Statute of Limitations.** See LIMITATIONS.

**Statutes Cited and Construed.**

LAWS, 1875.

- Taxes to pay bonds, p. 185. *School District v. Bank* ..... 93

REVISED STATUTES, 1866.

- Real estate, secs. 18, 19, 20, Chap. 43. *Hoyt v. Schuyler*..... 656

COMPILED STATUTES.

- Assignments, Chap. 5. *Wells v. Lamb.*..... 355  
 ———, Chap. 6. *Grimes v. Farrington* ..... 48  
 Attorneys, sec. 5, Chap. 7. *State v. Burr* ..... 605  
 Bonds, sec. 31, Chap. 9. *State v. Babcock* ..... 241  
 Chattel mortgages, sec. 9, Chap. 12. *State v. Hurds* ..... 318, 324  
 Cities of second class, secs. 1, 2, Chap. 14. *State v. Holden* 250  
 ———, secs. 42, 50, 53, Chap. 14. *State v. Holden* ..... 252  
 ———, Art. II., Chap. 14. *Caldwell v. City of Lincoln* ..... 573  
 ———, secs. 15, 29, Art. II., Chap. 14. *State v. McDowell*... 443  
 ———, sec. 69, Chap. 14. *State v. Bennett*..... 203  
 ———, sec. 69, Chap. 14. *U. P. R. R. Co. v. B. & M. R. R. Co.* 389  
 Counties, sec. 9, Art. II., Chap. 18. *State v. Meeker* ..... 447  
 ———, secs. 1, 7, Art. II., Chap. 18. *State v. Meeker* ..... 448  
 ———, secs. 17, 18, 19, 22, 23, Chap. 18. *Dary v. Dakota County* ..... 724  
 ———, secs. 53, 54, Chap. 18. *State v. Skirring* ..... 501  
 ———, secs. 149-152, Chap. 18. *State v. Saline County* 255, 256  
 County courts, sec. 2, Chap. 20. *Crow v. Bowen* ..... 529  
 ———, sec. 2, 18, Chap. 20. *Lamb v. Sherman*..... 687  
 Courts, secs. 47-49, Chap. 19. *Spielman v. Flynn* ..... 346  
 Decedents, secs. 245, 247, Chap. 23. *Saxon v. Cain* ..... 491  
 ———, sec. 88, Chap. 23. *Saxon v. Cain* ..... 492  
 ———, secs. 323-329, Chap. 23. *In re Reed* .... 401  
 Divorce and alimony, secs. 2, 33, Chap. 25. *Ward v. Lavery* 431  
 ———, secs. 12, 15, 16, 27, Chap. 25. *O'Brien v. O'Brien* 586, 587, 588  
 Elections, secs. 101, 103, Chap. 26. *State v. Meeker*..... 447  
 ———, sec. 101, Chap. 26. *State v. Skirring* ..... 501  
 ———, sec. 107, Chap. 26. *State v. Skirring* ..... 504  
 Fees, sec. 23, Chap. 28. *Reid v. State* ..... 696  
 ———, sec. 34, Chap. 28. *Crow v. Bowen* ..... 529  
 Frauds, sec. 3, Chap. 32. *Hansen v. Berthelsen* ..... 440  
 ———, sec. 5, Chap. 32. *Devey & Stone v. Payne & Co.* ..... 541

Frauds, sec. 17, Chap. 32. <i>Hicks &amp; Miller Tea Co. v. Mack</i>	341
Guardian and Ward, sec 1, Chap. 34. <i>Ward v. Lavery</i>	431, 432
Herd Law, sec. 2, Art. III., Chap. 2. <i>Allen v. Van Ostrand</i>	580
Homesteads, Chap. 36. <i>Aultman &amp; Taylor Co. v. Jenkins</i>	211
Illegitimate children, sec. 5, Chap. 37. <i>Hutchinson v. State</i>	266
Internal improvements, sec 1, Chap. 45. <i>State v. Babcock</i>	237
Liquors, sec. 3, Chap. 50. <i>Vanderlip v. Derby</i>	168
—, sec, 2, Chap. 50. <i>Vanderlip v. Derby</i>	169
—, Chap. 50. <i>Ex parte Maule</i>	273
Marriage, secs. 1-2, Chap. 52. <i>Ward v. Lavery</i>	430
Married women, sec. 2, Chap. 53. <i>Ward v. Lavery</i>	431
—, Chap. 53. <i>Broadwater v. Jacoby</i>	81
Occupying claimants, sec. 3, Chap. 63. <i>B. &amp; M. E. E. Co. v. Dobson</i>	452
—, Chap. 63. <i>Shuman v. Willets</i>	705
Public records, Chap. 74. <i>State, ex rel. Griggs, v. Meeker</i>	107
—, —, —. <i>Spielman v. Flynn</i>	347
Railroads, Art. VIII, Chap. 72. <i>State v. C., St. P., M. &amp; O. R. E.</i>	482
Real estate, secs. 2, 3, Chap. 73. <i>Aultman &amp; Taylor Co. v. Jenkins</i>	211
—, sec. 42, Chap. 73. <i>Ward v. Lavery</i>	431
Revenue, sec. 1, Chap. 77. <i>Finch v. York County</i>	53
—, sec. 7, Chap. 77. <i>Finch v. York County</i>	54
—, sec. 70, Chap. 77. <i>Suydam v. Merrick County</i>	154
—, secs. 144, 147, Chap. 77. <i>Thatcher v. Adams County</i>	486
—, sec. 144, Chap. 77. <i>Caldwell v. City of Lincoln</i>	575
—, sec. 181, Chap. 77. <i>Towle v. Shelly</i>	639
Schools, secs. 5, 16, subd. IV., Chap. 79. <i>State v. Bloom</i>	564, 565
—, sec. 11, subd. III., Chap. 79. <i>State v. Bloom</i>	565
—, subd. VII., Chap. 79. <i>State v. Grosvenor</i>	496

## CIVIL CODE.

Abstracts of cases, sec. 586. <i>Ballard v. Cheney</i>	59
Account books as evidence, sec. 346. <i>Masters v. Marsh</i>	466
Amendments, sec. 144. <i>McKeighan v. Hopkins</i>	35
—, —. <i>State v. Thiele</i>	222
Answer day, sec. 110. <i>Murphy v. Lyons</i>	690
Assignment of chose in action, sec. 31. <i>Doll v. Hollenbeck</i>	642
Attachment, sec. 235. <i>Grimes v. Farrington</i>	49
Confirmation of sale, sec. 498. <i>McKeighan v. Hopkins</i>	40
—, —. <i>Lamb v. Sherman</i>	687
Copies of records, papers, etc., sec. 408. <i>Spielman v. Flynn</i>	346
Court records, secs. 321, 322. <i>Hamilton v. Whitney, Clark &amp; Co.</i>	306
Deed of sheriff, sec. 500. <i>Lamb v. Sherman</i>	688
Demurrer, sec. 94. <i>Davy v. Dakota County</i>	724
—, —. <i>Boldt v. Budwig</i>	741



# INDEX.

781

Error, sec. 582. <i>State v. The Judges</i> .....	151
Execution, sec. 503. <i>McKeighan v. Hopkins</i> .....	31
——, sec. 543. <i>Lamb v. Sherman</i> .....	633
Exemption, sec. 531a. <i>Wright v. C., B. &amp; Q. R. R.</i> .....	179
Fee-book, sec. 321. <i>State, ex rel. Griggs v. Meeker</i> .....	106
Final judgment, sec. 581. <i>O'Brien v. O'Brien</i> .....	585
Injunction, sec. 250. <i>Boyd v. State</i> .....	131
Inspection of papers, sec. 394. <i>Spielman v. Flynn</i> .....	347
Judgment, sec. 429. <i>Boldt v. Budwig</i> .....	745
——; opening, sec. 82. <i>In re Reed</i> .....	400
Judgment of justice, sec. 1001. <i>Tootle, Hosea &amp; Co. v. Jones</i>	590, 592
Judicial sale, sec. 853. <i>McKeighan v. Hopkins</i> .....	38
Jurisdiction of justices, sec. 907. <i>Crow v. Bowen</i> .....	529
Lien of judgment, sec. 562. <i>Lamb v. Sherman</i> .....	686
Mandamus, sec. 645. <i>State v. Thiele</i> .....	222
New trial, sec. 318. <i>Bradshaw v. State</i> .....	646
Parties, secs. 29, 40, 42. <i>Mattis v. Boggs</i> .....	701
Petition in error, sec. 583. <i>State v. Babcock</i> .....	239
Pleadings, sec. 100. <i>McKinster v. Hitchcock</i> .....	105
Replevin, sec. 191a. <i>Cruts v. Wray</i> .....	583
Reversal of justice's judgment, sec. 601. <i>Tootle, Hosea &amp; Co. v. Jones</i> .....	590
Review by appeal on error, secs. 580, 777. <i>State v. Meeker</i> ...	450
Rights of action, sec. 901. <i>State v. Meeker</i> .....	449
Service by publication, sec. 78. <i>Murphy v. Lyons</i> .....	692
Stay of execution, sec. 583. <i>State v. Meeker</i> .....	449, 450
Supersedeas bond, sec. 583. <i>State v. The Judges</i> .....	150
——, sec. 677. <i>State v. Thiele</i> .....	221
Transcript, sec. 429a. <i>Lamb v. Sherman</i> .....	686
Transcript of judgment, sec. 561. <i>Lamb v. Sherman</i> .....	686
Uses and trusts, secs. 29, 30. <i>Doll v. Hollenbeck</i> .....	642
Verdict, sec. 295. <i>Bowers v. Rice</i> .....	578

## CRIMINAL CODE.

Bill of exceptions, sec. 515. <i>State v. Lawrence</i> .....	309
Challenge to jurors, sec. 468. <i>Bowman v. State</i> .....	526
Confining prisoners, sec. 377. <i>State v. Burr</i> .....	602
Error, sec. 508. <i>Bradshaw v. State</i> .....	646
Informations, sec. 579. <i>Stevens v. State</i> .....	648
Incest, sec. 204. <i>State v. Lawrence</i> .....	308, 310
Incestuous marriages, secs. 202, 203. <i>State v. Lawrence</i> ...	310, 313
Jurisdiction of county judge, sec. 313. <i>Ex parte Maule</i> .....	274
New trial, secs. 490, 491, 492. <i>Bradshaw v. State</i> .....	645, 646
Robbery, sec. 13. <i>Stevens v. State</i> .....	650
Wager, sec. 214. <i>Riddle v. Perry</i> .....	508

**Summons.**

1. Service by publication, how made. *Murphy v. Lyons*..... 689

**Supersedeas.**

1. Mandamus does not lie to compel judge of district court to fix amount of supersedeas in a case where a mandamus was issued against a railroad to compel it to run cars. *State, ex rel. Omaha Horse Railway, v. Judges*..... 149
2. Conditions of bond. *State v. Thiele*..... 220
3. Filing of, does not suspend judgment of removal from office. *State v. Mecker*..... 444

**Taxes.**

1. Money of a non-resident in the hands of an agent in this state, *Held*, Properly taxed. *Finch v. York County*..... 50
2. Levy to pay interest on bonds, and payment of such interest, takes bonds out of operation of statute of limitations. *School District v. Bank*..... 90
3. Increase of valuation by county board; an increase of \$114,382.43, in an aggregate valuation of \$1,296,419.10, *Held*, Void. *Suydam v. Merrick County*..... 155
4. In increasing valuation of a precinct not necessary that complaint should be made or notice served. *Id.*..... 159
5. Occupation tax may be imposed on liquor dealers in cities of the second class. *State v. Bennett*..... 191
6. By municipal corporations on occupations or business. *Caldwell v. City of Lincoln*..... 569
7. Business tax collected under a void ordinance, and paid under protest, may be recovered back. *Id.*..... 569
8. Under facts stated, *Held*, That plaintiff was entitled to judgment of foreclosure and to ten per cent of the amount found due as an attorney's fee. *Towle v. Shelly*..... 632
9. The purchaser of a lot of land bought subject to unpaid taxes due thereon does not take said property discharged of tax liens because the certificate thereof has fallen into the hands of the owner of the other portion of the lot. *Id.* 636

**Tenants in Common.** See EJECTMENT.

1. Tenants in common may join in an action for the possession of real estate held by one without title, or they may sue severally and recover according to their several interests. *Mattis v. Boggs*..... 698

**Tender.**

1. No credit given—no tender. *McPherson v. Wiswell*..... 127

**Title.** See ACTION QUIA TIMET. CONSTITUTIONAL LAW.  
DEED. JUDICIAL SALE, 2.

**Trial.**

1. Case should be submitted to jury on issues made by pleadings. *Hall v. Strobe*..... 658
2. Objections on trial that petition does not state a cause of action should be discouraged; amendment may be made instantler. *Roberts v. Taylor*..... 184
3. Offer of proof necessary in order to predicate error upon the sustaining of an objection to question the party's own witness. *Masters v. Marsh*..... 458
4. Introduction of original petition as evidence. *Buns v. Cornettus* ..... 109
5. Motion for new trial must be made in court below. *Cruts v. Wray*..... 581
6. Motion for new trial, when filed. *Bradshaw v. State*..... 644
7. Objections to instructions must be pointed out in motion, either by number or other means of identification. *Weir v. B. & M. R. R. Co.*..... 212
8. Where verdict is against two defendants jointly sued, and one, against whom there is no evidence, makes no motion for a new trial as to himself alone, and judgment is rendered against both, it will not be disturbed. *Boldt v. Budwig* ..... 739
9. New trial granted on account of remarks by court as to falsity of affidavit for continuance. *Bowman v. State*..... 523
10. In suit on bonds, where their execution, etc., is denied, unless there is some proof of their issue, sale, or ratification by defendant, court should direct verdict for defendant. *Post v. School District*..... 135

**Trover.** See CONVERSION.

**Trusts.**

1. An express trust cannot be raised by a parol promise to reconvey real estate by the grantor. *Hansen v. Berthelsen* 433

• **Undue Influence.** See FRAUD.

**Usury.**

1. Defense of usury available to maker against the assignee of usurious note and mortgage, transferred to him by a written assignment on the mortgage only, for value before maturity and without notice. *Doll v. Hollenbeck*..... 639

**Vacancy.**

1. In office county commissioner. *State v. Skirving*..... 497

**Variance.**

1. *Allegata et probata* must agree. *Young v. Filley*..... 543

**Vendor and Vendee.**

1. Where vendor remains in possession after warranty deed,

purchaser must ascertain by what right he retains possession. *Hansen v. Berthelsen*..... 433

### Verdict.

1. When by the verdict either party is entitled to recover money, jury must assess amount of recovery. *Bowers v. Rice*..... 576
2. A verdict in an action to recover money was in the following form: "We, the jury, duly impaneled and sworn, do say that we find for the plaintiff." *Held*, Not to authorize a judgment for any sum whatever. *Id.*..... 576
3. If against a clear weight of evidence will be set aside. *Cummings v. Winters*..... 719
4. Not set aside unless clearly wrong; not disturbed where there is a conflict in evidence, and it is nearly equally balanced. *Meyer v. Wilkie*..... 509
5. *Held*, Sustained by the evidence. *Hooper v. Browning*... 420  
*Morrill v. Tegarden*..... 535

### Wager.

1. Where a wager is illegal either party may claim the money deposited by him, from the stakeholder, even after the wager is decided against such party, provided the demand is made before the money is actually paid to the winner. *Riddle v. Perry*..... 505
2. If the money was actually paid by the stakeholder to the winner before notice or demand of the loser he will be exonerated. *Id.*..... 505
3. Section 214 of the Criminal Code does not apply to a mere stakeholder who has taken no part in the illegal transaction. *Id.*..... 505

### Wages.

1. Exemption of laborers' wages extends to non-residents. *Wright v. C., B. & Q. R. E. Co.*..... 175  
*Turner v. S. C. & P. R. R.*..... 246
2. Sixty days' wages of laborer exempt. *Wright v. C., B. & Q. R. R.*..... 175  
*Turner v. S. C. & P. R. R.*..... 241

### Waiver.

1. In contract to dig well. *Woodworth v. Hammond*..... 215
2. By administrator in case stated. *Saxon v. Cain*..... 489
3. Statute of frauds waived by a substantial admission of allegations of petition. *Connor v. Hingtgen*..... 473
4. Of defect in parties. *Hall v. Strobe*..... 658
5. Appeal waives objections to judgment. *Tootle, Hoses & Co. v. Jones*..... 589

**Warranty.**

1. Measure of damages is the difference between value of property as it actually was and what it would have been had it been as represented at the time warranty was made.  
*Young v. Filley*..... 543

**Witnesses.**

1. Cannot be contradicted for alleged inconsistent statements out of court, until questioned regarding them. *Hooper v. Browning*..... 420
2. Cross-examination of expert. *Hutchinson v. State*..... 263
3. Hypothetical questions to experts, how framed. *Ballard v. State*..... 609
4. Witnesses for the state in criminal trials. *Id*..... 609
5. A witness who has taken memoranda of facts, at or about the time of their occurrence, and who knows that such memoranda are correct, may hold such memoranda in his hand and testify to the facts, as facts, although he at the time admits that, even with the aid of the memoranda, he does not remember the occurrence of the facts. *Lipcomb v. Lyons*..... 511
6. Endorsement of names of, upon criminal information. *Stevens v. State*..... 647
7. Fees of witnesses coming from foreign state in prosecution for felony, taxable to defendant. *Reid v. State*..... 695

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